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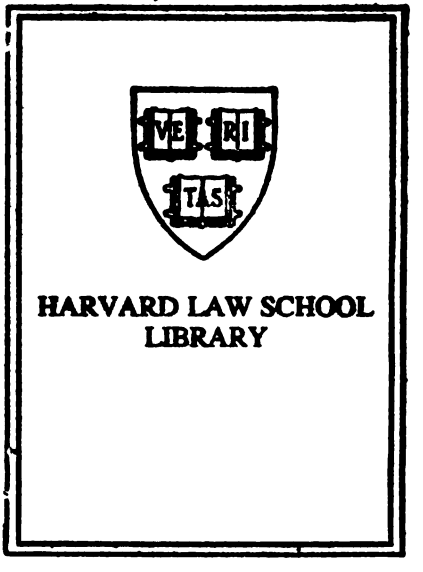

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

APRIL 21 TO JULY 8, 1903

JOHN A. BROOKS
STATE REPORTER

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APRIL TERM, 1903.*

PEOPLE *v.* DUPOUNCE.

133 1
135 *543

1. TRIAL—CROSS-EXAMINATION.
   A witness may be asked, on cross-examination, any question material to the issue, irrespective of the extent of the direct examination.

133 1
142 *623

2. BASTARDY—EVIDENCE.
   In a prosecution for bastardy, evidence of acts of intercourse other than that set up in the complaint is admissible as bearing upon the probable commission of the act alleged.

3. CRIMINAL LAW — RESPONDENT AS WITNESS — INCRIMINATING TESTIMONY—WAIVER OF PRIVILEGE.
   A respondent in a criminal case, who takes the stand in his own behalf, waives his constitutional privilege to the extent that he may be required to answer any questions material to the issue, though the answers to such questions tend to prove him guilty of some other crime than that for which he is on trial.

Certiorari to Bay; Shepard, J. Submitted February 6, 1903. (Docket No. 199.) Decided April 21, 1903.

Joseph Dupounce was convicted of bastardy. Affirmed.

Loranger & Flynn, for appellant.

Edward E. Anneke, Prosecuting Attorney, and *Lewis P. Coumans*, Assistant Prosecuting Attorney, for the people.

CARPENTER, J. Defendant was convicted in the court below of the offense of bastardy. The complaint alleged, and the evidence for the people tended to prove, that the bastard child was born February 9, 1901, and that it was

* Continued from Vol. 132.

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begotten on or about May 15, 1900. The complaining witness testified that she became 16 years of age March 17, 1901. Defendant became a witness in his own behalf, and on direct examination testified that he did not have intercourse with the complaining witness in the months of April or May, 1900. On cross-examination, despite defendant's objection that, contrary to section 32 of article 6 of the Constitution of Michigan, he was thereby compelled to be a witness against himself, he was made to answer questions which proved that he had sexual intercourse with the complaining witness in December, 1899, and that this continued until April 1, 1900; and that, though their relation was, on account of his illness, interrupted in April and May, it was resumed after June 1st. The sole question raised in this court relates to the ruling compelling defendant to give this testimony.

While it is clear that the cross-examination in this case compelled defendant to testify to the commission of the crime of rape, as the complaining witness was less than 16 years of age (see section 11489, 3 Comp. Laws), and though he could not be convicted of the offense charged in the complaint by reason of the intercourse occurring before April 1 or after June 1, 1900 (see *Hull* v. *People*, 41 Mich. 167 [2 N. W. 175]), nevertheless testimony establishing these other acts of intercourse had a legitimate tendency to prove defendant guilty of the offense for which he was being tried, and therefore to contradict his testimony on direct examination. See *People* v. *Schilling*, 110 Mich. 412 (68 N. W. 233); *People* v. *Keefer*, 103 Mich. 83 (61 N. W. 338); *Matthews* v. *Detroit Journal Co.*, 123 Mich. 608 (82 N. W. 243); *People* v. *Jamieson*, 124 Mich. 164 (82 N. W. 835). If defendant, by availing himself of the privilege of testifying in his own behalf, given him by our statute (see section 10211, 3 Comp. Laws), waived his constitutional right to refuse to answer the questions complained of, the ruling of the trial court is correct; otherwise, it is erroneous.

While this court has held (see *People* v. *Howard*, 73

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Mich. 10 [40 N. W. 789]) that a defendant who takes the stand as a witness in his own behalf is subject to the same inquiries upon cross-examination as any other witness, neither that nor any other decision of this court can be said to be an authority touching the precise question involved in this case. The question has, however, received the attention of the courts of many of our sister States. Contrary to the views of that eminent author and judge, Mr. Justice COOLEY (see his Constitutional Limitations, at page 317), it seems to have been universally held that the defendant, by taking the stand in his own behalf, thereby waives, to a certain extent at least, his constitutional right to refuse to testify. While the supreme court of Maine has held that the statute of that State, which reads, "The defendant in a criminal prosecution who testifies in his own behalf shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which he is on trial," "does not alter the law as it stood in this State before the enactment" (see *State* v. *Witham*, 72 Me., at page 534), the overwhelming weight of authority supports the proposition, contended for by the people, that he thereby waives his constitutional right to refuse to answer any question, material to the case, which would, in the case of any other witness, be legitimate cross-examination. *Com.* v. *Nichols*, 114 Mass. 285 (19 Am. Rep. 346); *Com.* v. *Bonner*, 97 Mass. 587; *Com.* v. *Mullen*, 97 Mass. 545; *Com.* v. *Morgan*, 107 Mass. 199; *Foster* v. *Pierce*, 11 Cush. 437 (59 Am. Dec. 152); *Com.* v. *Smith*, 163 Mass. 431 (40 N. E. 189); *Connors* v. *People*, 50 N. Y. 240; *People* v. *Tice*, 131 N. Y. 651 (30 N. E. 494, 15 L. R. A. 669); *State* v. *Ober*, 52 N. H. 459 (13 Am. Rep. 88); *Town of Norfolk* v. *Gaylord*, 28 Conn. 309; *State* v. *Allen*, 107 N. C. 805 (11 S. E. 1016); *State* v. *Kent*, 5 N. Dak., at page 541 (67 N. W. 1058, 35 L. R. A. 527); *Disque* v. *State*, 49 N. J. Law, 249 (8 Atl. 281); *State* v. *Cohn*, 9 Nev. 189. And this principle applies, even though the answers to such questions tend to prove

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him guilty of some other crime than that for which he is on trial. *Com.* v. *Nichols*, *State* v. *Kent*, and *Connors* v. *People*, *supra*. As, in this State, a witness may be asked, on cross-examination, any question material to the issue (*People* v. *Barker*, 60 Mich., at page 302 [27 N. W. 539, 1 Am. St. Rep. 501]; *Ireland* v. *Railroad Co.*, 79 Mich., at page 164 [44 N. W. 426]; *Hemminger* v. *Assurance Co.*, 95 Mich., at page 359 [54 N. W. 949]), we are forced to the conclusion that there was no error in the ruling complained of, and that the conviction should be affirmed.

The other Justices concurred.

CREYTS *v.* CREYTS.

133 4
s143 375

1. DIVORCE—EXTREME CRUELTY—CONDONATION.
   The fact that, after being cruelly treated, a wife continues to live with her husband for several years, in the hope of receiving proper treatment, in which she is disappointed, will not prevent her from relying on the original cruelty in a suit for divorce.

2. SAME—EVIDENCE.
   Evidence examined, and *held* to entitle a wife to a divorce on the ground of extreme cruelty.

Appeal from Ingham; Wiest, J. Submitted February 20, 1903. (Docket No. 60.) Decided April 21, 1903.

Bill by Carrie L. Creyts against John Creyts for a divorce. From a decree dismissing the bill, complainant appeals. Reversed.

Rollin H. Person, for complainant.

L. B. & H. M. Gardner, for defendant.

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CARPENTER, J. Complainant appeals to this court from a decree dismissing her bill of complaint, asking for a divorce from defendant on the ground of extreme cruelty. The parties to this suit were married August 21, 1894. At that time complainant was 24 years of age, and defendant 53. The defendant was a wealthy farmer, residing in the township of Watertown, Clinton county. He was a widower, and the father of five children, ranging in age from 26 to 17 years. By an antenuptial agreement he promised that complainant should have out of his estate, if she survived him, in satisfaction of her dower and statutory rights, $3,000, which should be increased to $4,000 in case defendant lived 10 years after their marriage. It was also agreed that complainant and defendant should permit the children of the latter—except the oldest child, who lived in the city—to reside on the farm, while they should take up their residence in the city of Lansing. Shortly after the marriage, and while complainant and defendant were on their wedding trip, defendant made an unfortunate investment. In consequence of this, it was decided that they would not go to the city to live, but would take up their home with the children by his former marriage.

Less than a year after the marriage was contracted, it was discovered that the complainant was about to become a mother. This was regarded as a personal grievance by the children of defendant living at home. According to their testimony, they "felt hard about it;" they "didn't think it was right." It is very clear that they made known their feelings to complainant, and defendant told complainant that he felt sorry for them. A short time before the child was born, defendant's children met at the house of complainant and defendant, to discuss and determine what complainant's condition required her and defendant to do, and defendant compelled complainant to be present at this conference. Complainant refused to accede to the request of the children to move to a tenant house, and finally prevailed upon the defendant to tell his

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children that he and his wife would remain, and, if "they could not put up with things as they were," they might leave, but "they remained." Complainant and defendant continued to reside on the farm until 1898. It was certainly a most unhappy home. She and defendant's daughters often quarreled. When she appealed to defendant, he would say: "I know nothing about this trouble; you will have to settle it between yourselves."

In the fall of 1898 complainant and defendant removed to the city of Lansing. In June, 1900, a serious, but not dangerous, surgical operation was performed on complainant. While she was recovering from this operation, and still in bed, the little daughter of complainant and defendant, then about four years old, was permitted to visit a neighbor's house one afternoon. She did not return speedily, as she had promised, and complainant became very anxious, and urged that the child be sent for. Defendant refused, saying that the child had promised to come home, and he was going to see how long she would stay. At 9 o'clock the child was brought home, and, when defendant saw her coming, he turned out the lights and locked the doors, and refused to admit her, notwithstanding her screams. Complainant was nervous and worried, and in a helpless condition, but not until she threatened to get out of bed herself and open the door would defendant admit the child to its home. During this same illness of complainant, defendant did other things to provoke and annoy her. On one occasion, complainant's brother-in-law, the husband of her sister, visited her, and, in defendant's presence, kissed her. After he had gone, defendant—who finds no fault in his conduct—lay down on the lounge and said, "O, how I would like to embrace your sister! How I would like to kiss her!" repeating this statement several times in a sarcastic tone.

About five weeks after this operation, complainant, in consequence of the treatment already referred to, and other similar treatment, decided to leave defendant. She took her child and went to the house of defendant's brother,

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and, while waiting there for a carriage to carry her to her father's home, defendant drove up and carried the child away. Whether or not he intended to deprive complainant of the child, as he had threatened, is uncertain; but complainant thought, and had a right to think, that was his purpose. After some time spent in finding defendant, by driving around town with a livery rig, complainant, by a display of force, recovered her child. After staying home about four weeks, complainant, at defendant's intercession, again resumed marital relations with him.

About the last of September, 1900, defendant, while attending the fair at Grand Rapids, got injured in a fight with the police of that city. He came home shortly after, and, while being treated for his ailments there, without any adequate cause whatever, became angry at complainant, left his home, and went to the hospital. He stayed there only a day or so, and, complaining that the food was not good enough for him, and that it was not warm enough, he went to the Hotel Wentworth, and refused for several days to comply with complainant's urgent request to return home.

On the 15th of October, 1900, occurred the last and final difficulty. Defendant, without giving any reason therefor, demanded of complainant their marriage certificate. She, thinking that he wanted the same for some improper purpose, and desiring to preserve it, refused to grant his request, and went and locked herself in the room where it was. He commanded her to open the door, and on her refusal he violently pounded the door with a piece of gas-pipe until he broke the lock.

These are the salient charges made in the bill and established by the testimony. The testimony, too, establishes other charges, of a more flagrant character, not specified in the bill, and we think it creditable to complainant that she did not specify them. While we will not grant relief because of those latter charges, they prevent our believing that defendant's general good conduct compensated for the wrongful conduct complained of.

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In reaching these conclusions we are not aware that we violate the principle, often asserted by this court, of assuming that the trial judge, having a superior opportunity of passing upon the credibility of witnesses, has determined the questions of fact correctly. We infer from the carefully prepared opinion of the learned circuit judge in this case that he found the facts substantially as we find them, and that he dismissed complainant's bill because he did not think these facts amounted to such extreme cruelty as justified a divorce.

It is suggested that compelling complainant to be present at the conference when her condition of motherhood was discussed by defendant's children was not intolerable, because she continued to live with defendant for several years thereafter. She had a right to overlook this wanton cruelty, in hopes that his subsequent conduct would be propor. If it was not, if she was subjected to other cruelty in her domestic life, there is no reason why she should not, in the proof of her grievances, rely upon this as one of her charges.

It is said that the turning of the lock and refusing to admit into its home the four-year-old baby of complainant and defendant was not cruel; that this was a method of correction that the father might properly adopt, and any injury resulting was caused by complainant's oversensitiveness and desire to interfere. If it is true that this was a proper method of punishing the child, it is none the less true that the time and method both were well calculated to grievously wound the feelings of the sick mother and to retard her recovery. A mother who resents such a method of punishment does not display oversensitiveness or an improper desire to interfere. If she did not resent it, and was not affected by it, it might well be argued that she lacked qualities essential to a good mother.

It is insisted that there was nothing cruel in the display of force when the door was broken in to obtain the marriage certificate, because no legal harm could have resulted from its destruction. This contention implies that the

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only reason complainant had for resisting defendant's attempt to obtain possession of the certificate was the fear that its destruction would cast some doubt on the validity of their marriage. We do not so understand her testimony. While it clearly appears that she was justified by defendant's conduct in believing, and did believe, that he wished the certificate for an improper purpose, it must be admitted that she has not given a very clear statement of her reasons for resisting his demand. Neither is this strange. It is almost impossible to state these reasons in words, but we know what they are. The sentiments of complainant's sex, better than any words, inform us what her reasons were. We may know judicially that every wife desires to preserve her marriage certificate. Her right of dominion over that document is universally regarded. She regards it as one of her most cherished possessions, and when her husband demands it in a manner which indicates his intention to damage it, destroy it, or make any other improper use of it, we know, better than we or she can explain, why she feels impelled to frustrate him. If it is true, as claimed by defendant, that he wanted to look at this certificate for the purpose of seeing whether there was any mistake in its date, he should have stated his purpose. He did not state that purpose, and complainant was justified, under the circumstances, in believing, as she did, his purpose to be improper, and in resisting him.

As an offset to these charges, it is suggested that complainant moved the portrait of defendant's first wife from its place in her parlor, and put it in the storeroom; that she removed the memorial card and the plate taken from the first wife's coffin, which occupied a prominent place in the parlor, and put them in a trunk upstairs. Her reason for this act, which seems to defendant to have been so improper, was that the eyes of the bead wife seemed always to be on her when she lay upon the lounge, sick, in the room. It is suggested that she might have moved the lounge. This is no answer, because it appears from the

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testimony that the portrait had this not uncommon characteristic: Its eyes seemed to rest upon and follow whoever was in sight of it. It is not discreditable to the complainant that she removed this portrait and the mournful reminders of the death of the first wife from the conspicuous place they occupied in her parlor; but it is discreditable to the defendant that, notwithstanding this removal, and complainant's reasons therefor, he insisted upon returning the portrait to the place it formerly occupied.

It is also said that complainant did not show proper affection for defendant's children. The specifications of this charge are these: That she refused to permit defendant's youngest daughter to live with them after they removed from the farm, and that she expressed hatred for one of his sons. The treatment she had received from this daughter justified complainant in this refusal. Complainant did dislike one of defendant's sons, and had expressed her dislike in forcible language to her dressmaker. She certainly had no occasion to love this son. It was he who had suggested that complainant and her husband leave their home and go to the tenant house, because she was in the family way. Though entertaining this dislike, it is proper to note that she made no display of her feelings, and but one witness testifies to hearing her express them. Defendant certainly was not grieved by this expression of complainant's feeling. It does not appear that he ever knew of it. Nor would he have been grieved had he known it. His own affection for this son, a grown man, did not prevent his turning him from his home just before he married complainant, and once thereafter.

The suggestions that complainant paraded her troubles before the neighbors more than was seemly, that she is not so meek as one might infer from her claim, and that she testified to many charges which are trivial in character, do not disentitle her to relief.

The decree of the court below will be reversed, and a decree entered here granting complainant a divorce, and giving her the custody of her child. She should also

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receive a proper allowance for alimony, and for the expenses of this suit, if defendant has not already paid them. We shall not at this time undertake to determine the amount of such allowance, for two reasons: The record is not in a satisfactory shape to enable us to do that, and this is a matter which the parties themselves should be able to adjust. If they are unable to do that, it may be made the subject of a future application, and we will make such order as may be necessary.

The other Justices concurred.

ROCKWELL v. OAKLAND CIRCUIT JUDGE.

LARCENY—DOGS.

Under 3 Comp. Laws, § 11553, providing for the punishment of "every person who shall commit the offense of larceny, by stealing, of the property of another, any money, goods or chattels," etc., a dog may be the subject of larceny.

Mandamus by Kleber P. Rockwell, prosecuting attorney of Oakland county, to compel George W. Smith, circuit judge of said county, to vacate an order quashing an information. Submitted March 12, 1903. (Calendar No. 19,597.) Writ granted April 21, 1903.

Kleber P. Rockwell (*H. M. Zimmermann*, of counsel), for relator.

Edward A. Barnes and *U. Grant Race*, for respondent.

HOOKER, C. J. The relator is prosecuting attorney for the county of Oakland, and asks a *mandamus* requiring the respondent, a circuit judge, to vacate an order quashing an information charging the larceny of a dog, which

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order was based upon the claim by the respondent that a dog is not the subject of larceny in this State.

In most of our States, larceny has become an offense of statutory definition. Thus, in some States it is provided that one who steals the *personal property* of another shall be punished, etc.; constituting one class. In our own and other States the provision is that "every person who shall comit the offense of larceny, by stealing, of the property of another, any money, *goods or chattels*," etc., shall be punished. 3 Comp. Laws, § 11553. This constitutes another class. In several of the States, these provisions have been construed to include dogs.

Of those of the former class, the following are illustrations:

In *Harrington* v. *Miles*, 11 Kan. 484 (15 Am. Rep. 355), Mr. Justice Brewer said that a dog was the subject of larceny under a statute which made punishable, as such, "the taking and carrying away of any money, goods, rights in action, or other personal property or valuable thing whatever." The writer said: "Now, if a dog is *personal property*, or a *thing of value*, it would seem that the stealing of one would be larceny within the statute."

In *Mullaly* v. *People*, 86 N. Y. 365, one was held to have been lawfully convicted under a statute which provided that "every person who shall be convicted of stealing the personal property of another," etc., shall be punished.

Of the latter class, the following will be found in point:

In *Com.* v. *Hazelwood*, 84 Ky. 683 (2 S. W. 489), it was held that a dog was a subject of larceny under a statute providing for the punishment of those who steal "goods and chattels."

The same was held in *State* v. *Brown*, 9 Baxt. 53 (40 Am. Rep. 81), where it was said that the terms "personal property" and "goods and chattels" are convertible.

The case of *Hamby* v. *Samson*, 105 Iowa, 112 (74 N. W. 918, 40 L. R. A. 508, 67 Am. St. Rep. 285), is sub-

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stantially like the case before us, our statute being similar to that of Iowa.

In all of these cases, mention is made of the fact that property in dogs has been recognized by the legislatures, and they decline to follow the hard and fast rule adhered to in the case of *State* v. *Lymus*, 26 Ohio St. 400 (20 Am. Rep. 772), which is the strongest authority cited in favor of the respondent.

The case of *State* v. *Doe*, 79 Ind. 9 (41 Am. Rep. 599), is plainly distinguishable, for the court there draws an inference, from certain legislation mentioned, that the statute defining larceny was not meant to include dogs.

An inferior Ohio court has, since the decision in *State* v. *Lymus*, *supra*, sustained a charge for stealing a dog, after a modification of the statute was made by adding to the term "personal property" the words "anything of value." See *State* v. *Yates*, 10 Crim. Law Mag. 439. It is hard to avoid the conclusion that this disregards the earlier holding in *State* v. *Lymus*, for we must conclude that only personal property is meant to be included in the term "anything of value," and, if there may be personal property without value, it would seem to follow that the original decision was based solely upon the proposition that a dog had no value at common law, which was clearly incorrect. If it was not so based, but was decided upon the ground that, by the common law, a dog was excepted from personal property in general, and therefore could only be included by express legislative provision, it is not clear that it should be any the less so under the amended act than before. In any event, it is apparent that the earlier decision refused to construe the statute according to the generally accepted meaning of the term used, unaffected by the common-law rule, and that the court in the case of *State* v. *Yates* refused to follow the precedent.

In our own State, as in the others mentioned, especially in New York and Iowa, an intent to include dogs is found, because it is said that they are within the terms used in the statute according to their common meaning. There

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are other cases where courts find dogs to be the subjects of larceny simply upon the ground that they have been recognized as property by legislatures. This is consistent with the recognized rule that new forms of personal property become subject to existing laws. Thus, illuminating gas has been so held, though unknown as property until a comparatively recent date. Our own statute makes "*goods and chattels*" the subjects of larceny, and, while we are not disposed to say that "personal property" may not be considered a broader term, we have seen that statutes using each have been held to supersede the common-law rule, and to apply to all property which falls within the term used as generally understood.

The writ will issue as prayed.

MOORE, CARPENTER, and MONTGOMERY, JJ., concurred. GRANT, J., took no part in the decision.

PEOPLE *v.* RICH.

1. CRIMINAL LAW—RAPE—EVIDENCE—COMPLAINTS OF PROSECUTRIX.

   In a prosecution for carnally knowing a girl 12 years old, evidence of complaints made by her almost immediately after the alleged offense is admissible.

2. SAME—HARMLESS ERROR.

   Where respondent in a prosecution for rape admitted that there was blood on the snow at the place where the offense was alleged to have been committed, undertaking to explain its presence, the admission of other testimony to the same effect, objected to on the ground that witness was not shown to be an expert, was not prejudicial.

3. SAME—CROSS-EXAMINATION.

   Where, in a prosecution for rape, respondent's mother, as a witness in his behalf, testified that, after the occurrence, she went with P. to see prosecutrix's mother, evidence as

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to what she said to P. while so accompanying him was proper cross-examination.

4. SAME—HARMLESS ERROR.

The exclusion of respondent's testimony that S. had no authority to settle the case for him was not prejudicial, where he had testified that he never authorized anybody to settle the matter, and had written S. not to settle.

5. SAME—ADMISSIONS—DURESS.

The fact that admissions by a respondent charged with rape were made in the presence of prosecutrix's father, who was excited, and made threats against respondent, does not necessarily require the exclusion of the admissions as made under duress.

6. SAME—INSTRUCTIONS.

An instruction that a person's admission of guilt is strong evidence against him, unless he was under such restraint that it could not be said to have been made voluntarily, and that it was for the jury to determine the purpose and motive of any admission of respondent, and whether it was true, taking into consideration his testimony as well as that of the other witnesses, sufficiently guarded respondent's rights.

7. SAME—CONSPIRACY.

An instruction that respondent claimed that the prosecution was the result of a conspiracy,—"that is, there was no truth whatever in the charge,"—and that the evidence on that subject should be considered with the other evidence, but that respondent was not required to adopt any particular theory, being entitled to rest upon his plea of not guilty until the prosecution should convince the jury of his guilt, constituted a sufficient charge on such issue.

8. SAME—CREDIBILITY OF WITNESSES.

An instruction that the rules governing evidence generally applied to the respondent as a witness in his own behalf, and that the jury were at liberty to give his evidence such weight as it was entitled to in view of all the facts in the case, taking into consideration his interest in the outcome, was not misleading.

9. SAME—REASONABLE DOUBT.

Where, in a prosecution for rape, the testimony of the complaining witness to the main fact was direct, the circumstantial evidence being corroborative merely, an instruction that it was not necessary that every fact and circumstance and every link in the chain be proved beyond a reasonable

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doubt, but that all the evidence in the case, when considered as a whole, must satisfy the jury beyond a reasonable doubt that respondent was guilty, was not erroneous.

Error to Newaygo; Palmer, J. Submitted November 21, 1902. (Docket No. 223.) Decided April 21, 1903.

Arthur L. Rich was convicted of an assault with intent to commit the crime of rape, and sentenced to imprisonment in the State house of correction and reformatory at Ionia for two years and six months. Affirmed.

Samuel D. Clay (*Grove & McDonald* and *David E. Burns*, of counsel), for appellant.

George Luton, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was charged with the offense of statutory rape, committed on the person of a female child 12 years of age. He was convicted of an assault with an intent to commit rape, and the case is before us for review on error.

The assignments of error are numerous, but have been very properly grouped. The first four are errors assigned upon the admission of testimony of statements made by the young girl who is claimed to have suffered the assault. It is unnecessary to set out at length the objections or testimony. We are all agreed that the testimony was clearly admissible within the previous rulings of this court. They consisted of complaints made by the child almost immediately after the offense, and the court, so far as we can discover, was careful in keeping the testimony within the limits prescribed by the rule.

Complaint is made of the ruling admitting the testimony of one George Evans that, at the scene of the alleged offense, he found snow which had a red color, produced by blood. It is said that he was not shown to be an expert; but, whether this was necessary or not, the respondent's own version of what occurred at this place showed that there was bloody snow, which he accounted for by

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stating that he injured his hand, that it bled freely, and that he gathered up the snow in his hand, and threw it down in a bloody condition.

Error is assigned upon the ruling admitting the question to the witness Anna S. Rich, mother of respondent, as to all the conversation she had with a Mr. Pollard, when she testified that she went with Mr. Pollard to see Mrs. Evans, the mother of the injured girl, thinking, as she testified, that she could go down and quiet Mrs. Evans. The witness was called to the stand by the respondent, and testified to the conversation at the Evans house, and that she went there with Mr. Pollard. The cross-examination as to what she said to Mr. Pollard was, therefore, clearly competent as bearing upon her direct examination.

Objection is made to the exclusion by the court of the question put to the respondent as to what he said to Frank Seaman, his brother-in-law, at the time when he went to his house at 1 o'clock in the morning after the offense was alleged to have been committed, and directly before he left the State. It is said that, had he been permitted to testify, he would have testified that Mr. Seaman had no authority to settle the case for him. While this question might have been properly allowed, it is very manifest that no injury was done to respondent, for he had testified that he never authorized anybody to settle the matter for him, and that he wrote Mr. Seaman not to settle.

Error is assigned upon the admission of the testimony of Pollard and Sharp as to admissions made by respondent, on the ground that the admissions were not voluntary, but were made under duress and restraint. We think the circumstances are not such as to exclude this testimony as matter of law. Much of the talk was had in the presence of Mr. Evans, the father of the injured girl, who was very naturally excited, and is shown to have made threats against respondent; but that there was such restraint of the respondent as to exclude the testimony of his statements made at this time we do not find. The court charged the jury upon that subject as follows:

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"If a person accused of a crime voluntarily admits the accusation, that is very strong evidence of his guilt, because it would be unnatural for a person accused of crime to voluntarily admit the accusation against himself, knowing that it would be used against himself, unless he committed the crime; and *the only exception to that rule would be where a person is so coerced, or under such duress or restraint, as that he would make a confession or admission involuntarily, and not of his own free will.* The court has permitted the evidence in this case to come to the jury, that the jury might take it, and analyze it and weigh it, to see what is the truth of the matter; and, if the confession or admission was made, for what purpose, with what motive, and if it was true. You have a right to take into consideration the testimony of the respondent in this case on that branch of the case, as upon all other branches of the case."

We think this sufficiently guarded the respondent's interests in that regard.

The respondent puts forth the claim that there was a conspiracy to charge him with this offense for the purpose of getting money. It is very doubtful whether the testimony was of a character to justify the submission of the testimony under discussion to the jury. The circuit judge, however, did charge the jury upon that subject as follows:

"It is also claimed by the defense that this whole matter concerning the charge against this respondent is a conspiracy, or the outgrowth of a conspiracy; that it is a trumped-up charge,—in other words, made out of whole cloth, as we say in common parlance,—and that there is no truth in it whatever. Now, that evidence goes into the case to be considered with the other evidence in the case, not necessarily as affirmative proof, because, as I said, when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution. But this is the respondent's claim. You can measure it, you can weigh it, you can sift it, and see what there is to it; that is what you may do. The defense does not have to have a theory, except as they see fit to adopt a theory. The defense is, 'not guilty;' that is the plea; and, as I told you, they rest upon that plea until the prosecution shall convince the jury of the guilt of the respondent. They may meet that proof in whatever way they see

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fit. That is what I mean by saying that the defense rely upon a conspiracy. They may meet it by such claim as they see fit to put forth in the case."

This charge went as far as the evidence in the case warranted.

Error is assigned upon the refusal of the court to give a request upon the subject of the weight to be given to the respondent's testimony. The court did charge the jury that the rules governing evidence generaliy applied to him, and that the jury were at liberty to give it such weight as it was entitled to in view of all the facts and circumstances in the case, and referred to the question of the interest which a witness might have as bearing upon his credibility. We think the jury could not have been misled by these instructions.

The only remaining question which we need to discuss arises over the instruction of the court, which, after very clearly defining "reasonable doubt," proceeded as follows:

"And when I say that the case must be proven as laid beyond a reasonable doubt before you could convict, I do not mean that *every fact* and *every circumstance* and *every link* in the chain must be proven beyond a reasonable doubt; I don't mean that; that would be unreasonable. I mean that the entire evidence in the case, when connected together as a whole, convinces you that it is a safe basis upon which to rest a verdict of guilty, and that you are satisfied beyond a reasonable doubt, acting upon all the evidence in the case, that this respondent is guilty of one or another of the offenses which the court has defined."

In order that this instruction may be understood, we quote the instruction upon reasonable doubt, which was as follows:

"Now, the court will define to you what is meant by a reasonable doubt. It is a doubt that grows out of the evidence in the case, if it exists at all. It cannot originate anywhere else. It is not an imaginary doubt, not a speculative doubt, not a doubt based upon a fancy. It is a doubt based upon reason; such a doubt as you can give a reason for. And as you investigate this case along the

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lines of evidence (and nowhere else) you are to say whether you find that kind of doubt in the proof which causes you to hesitate and halt in your deliberations. The court does not say to you in these instructions that if you hesitate in your deliberations until by discussion you harmonize these differences, that each place where you hesitate is a reasonable doubt; but if you reach a point beyond which you cannot go conscientiously, and say that this respondent is guilty, then your deliberations come to a halt. It is such an obstruction as you cannot, as conscientious men, get by. The train of facts and circumstances in the case moves along, and, though there be obstructions here and there on the track, if they can be removed by fair, dispassionate discussion, and you reach the end of the journey, and then become satisfied in your minds that this respondent is guilty, then you have removed these obstructions, and they are not reasonable doubts, or any one of them. But if, as I say, the train of circumstances stops, and you are unable, after fair, calm, unprejudiced discussion, to get by that stopping place, then there is such a reasonable doubt, growing out of the evidence in the case, that you cannot get over or get by, and you should say then that the respondent should have the benefit of that reasonable doubt, and be acquitted by your verdict."

The respondent's counsel contend that the instruction first above quoted is in conflict with the holding of this court in *People* v. *Aikin*, 66 Mich. 481 (33 N. W. 821, 11 Am. St. Rep. 512). It is true that in that case an instruction that the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the respondent's guilt was held erroneous. That was a case, however, depending upon circumstantial evidence, and very clearly the rule as given by the circuit court in that case was error. But in the same case the case of *Marion* v. *State*, 16 Neb. 359 (20 N. W. 294), was cited, in which the following inquiry and reasoning appears, which is very pertinent to the present case:

"What is meant by the word 'link,' as used therein? If the jury were given to understand that it referred only to evidentiary facts which might add force or weight to other facts from which the inference of guilt could be drawn, then the instruction might be said to be correct."

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We think this is precisely what the jury would have understood from the charge in this case. It was not a case depending upon circumstantial evidence. The testimony of the complaining witness to the main fact was direct, and the case depended upon her statement and that of the respondent. All the other testimony in the case was corroborative. If the testimony of the complaining witness was accepted as true, the offense, at least to the extent of an assault with intent to commit rape, was fully established. The other circumstances or "links" were, in their nature, corroborative, and the jury could not have understood the instruction in any other way.

We think no error was committed to the prejudice of the respondent, and that the conviction should be affirmed.

The other Justices concurred.

WILLIAMS v. WILLIAMS.

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DEEDS—VALIDITY—CAPACITY OF GRANTOR.

Deceased conveyed certain land to his four sons, reserving a life estate, to save the property from being squandered through his intemperance. One of the sons afterwards died, leaving his father as his sole heir; and subsequently deceased conveyed the interest so inherited to F., his daughter-in-law, with whom he had lived for some time, and for whom he had great regard. The attorney who drew the deed testified that deceased was then of sound mind, and was not under the influence of liquor, and that he knew perfectly the character of his acts; that witness endeavored to dissuade him from his purpose, but that he persisted, and that the deed was executed and delivered to witness, to be held in escrow until decedent's death, and then to be delivered to F. *Held*, that the conveyance should be sustained.

Appeal from Macomb; Tucker, J. Submitted January 9, 1903. (Docket No. 21.) Decided April 21, 1903.

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Bill by William A. Williams against Florence G. Williams and others to set aside a deed. From a decree for complainant, defendant Florence G. Williams appeals. Reversed.

The purposes of this bill are to set aside a deed executed October 30, 1899, by Charles W. Williams, now deceased, to Florence G. Williams, one of the defendants, to determine who are at the present time the owners of the lands described in the bill, and to secure a partition thereof. The court below entered a decree setting the deed aside. That portion of the decree presents the only question before us.

Mr. Williams settled at Mt. Clemens in 1865, where he engaged in the tailoring business, and became the owner of the premises in question. He lived there until 1888, when he moved into Detroit. He became addicted to the use of intoxicating liquors, largely lost his business, and became nearly, if not quite, an habitual drunkard. In 1888 he deeded the land in question to his four sons, Emil, Richard, William, and Frederick; reserving to himself and his wife a life estate in the premises. The purpose of this deed was to prevent the property being squandered by the father on account of his drinking habits. As found by the circuit judge, its purpose was to place the property where it could not be squandered by him, and to secure a certainty of income during his own life and the life of his wife.

Emil and Richard lived in Detroit, and were engaged in the livery business. About two months after the execution of the deed, his wife died, and Mr. Williams went to Detroit to live with his two sons, Emil and Richard, who managed and controlled his property, boarded and clothed him, and furnished him with what pocket money he had. He lived mostly with Richard, but sometimes with Emil. Frederick died unmarried in January, 1892. His father, Charles, was his sole heir, and thereby became the owner of the one-fourth interest in the property which he had

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previously deeded to Frederick. It is this one-fourth interest which was conveyed by Charles W. Williams to Florence, and is now the subject of controversy, though the deed purported to convey the entire interest.

Richard died March 22, 1898, leaving a last will and testament. By his will he left to his wife, the defendant Florence, $1,000,—the income thereof, and the principal, if necessary, to be used by her in supplying the necessities and wants of his father when his own income was not sufficient,—and bequeathed to his wife absolutely any part of said sum remaining after the death of the father. The remainder of his property he bequeathed to her. She was made executrix of the will, and in her final account she reported that she had turned over to herself, as trustee, the said sum of $1,000.

Emil died September 20, 1899, bequeathing his property to his wife. After the death of Emil, Charles lived with the defendant Florence, and died May 13, 1900. The deed to defendant Florence was not recorded until July 20th, 10 days after this suit was commenced. The heirs knew nothing about the deed until her answer to the first bill, which was a bill for partition, was filed. The bill, by leave of the court, was then amended so as to contest the validity of this deed. Mr. Williams was 75 years old at the time the deed was executed.

Clark, Durfee & Allor, for complainant.

James Swan and *Howard S. Dean*, for appellant.

GRANT, J. (*after stating the facts*). After careful examination of the evidence, we feel compelled to reach a different conclusion from that reached by the learned circuit judge. It was a very natural thing, under the circumstances, for the deceased to execute this deed transferring the property to his daughter-in-law, Florence Williams. He had lived with her and her husband for many years. He had also lived with her after her husband's death. It is established by the evidence that she

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took good care of him. His feelings towards her, and the reason for them, are shown by the testimony of Mr. Rohnert, hereinafter stated. We think he was competent to execute deeds and other papers when not under the influence of intoxicating liquors. Complainant himself admits that, if he had executed a deed when he was not drunk, he should think he was competent to make it, and would know what he was doing. It is conclusively shown that he was sober when the deed in question was executed.

Mr. Morse Rohnert, then an attorney, and now one of the circuit judges of Wayne county, drew the deed, and took the acknowledgment of it. His testimony is quite conclusive of the fact that he was mentally sound, and that no undue influence was used to obtain the deed. We quote his testimony as to the execution of the deed, and what took place at the time:

"He always spoke very friendly of Florence, as he called her. He told me all that he was indebted to Florence for, and after Emil's death he wanted me to look after the property, while he also told me that he wanted to make a deed outright of the property in Mt. Clemens to Florence. He talked to me about this matter several times. Then along about the end of October, the day the deed was drawn and signed, he came into the office one afternoon with Mrs. Florence Williams. Mrs. Florence Williams had some business to transact, and I had her go into my private office, and I finished my business with her. He sat in the outer office at the time, and I dismissed Mrs. Williams from my private office, and then Mr. Williams spoke up and said he would like to speak with me. I called him into the office. I left the office door open, and he said that he wanted to speak privately. He then told me that he wanted me to draw this deed to Florence. Well, I talked the matter over in a general way with him, and I said, 'Now, I have had experience with deeds of that kind.' He told me why he wanted it done; Florence had been very kind; that he owed a great deal to Florence; his home here was really with Richard and Florence, and all the comfort he had in his declining years was due to Florence; and that, now his sons were away, although she was not related by blood, still she was looking after him and giving him a home. I told him I had had

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experience with people, particularly parents giving deeds to their children, and I thought he had better make a will, and leave it after his death. He says, 'No,' he didn't want to make a will; that wills were contested, and he wanted to avoid any contest on a will, and he wanted to have the deed drawn up and turned over to her right away. I talked about the consideration. He says, 'Now, Florence, she said she would take care of me anyway; as long as I wanted a home with her I could have it; and she has always done right by me, and I know she will do so, and I want this deed made out to her.' I told him, 'If you do make out a deed, you want to reserve a life estate, anyway.' He didn't feel as though he wanted that, but he finally said he would reserve a life estate to himself. I then told him that I wouldn't advise him to deliver the deed at once. 'Well,' he said, he wanted to deliver it. 'Well,' I said, 'you had better wait a little while.' 'No,' he said, he wanted it drawn; and at the same time he talked,—whether just before or just after, but he talked about getting this power of attorney executed to me. I think it was just after we had talked about the deed. He had talked before that about my drawing a power of attorney, and, of course, when he talked about the deed, I didn't think it was necessary to have a power of attorney; but after I had talked with him, and advised him about a better way than an absolute conveyance, then he began to talk about the power of attorney again. He then directed me to draw the deed, and also the power of attorney. I drew the deed, and I drew the power of attorney; that is, I wrote in the proper parts, and I passed it out to Miss Hill to put in the description. One of the reasons why the power of attorney was drawn was because I wanted to hold off on the deed, thinking that possibly, by giving him a day or two time on the deed, that he might reconsider the deed; that is, I wanted to feel sure that he was acting under his own volition. The deed was drawn. I then called in Miss Hill, my stenographer, and I read the deed over to her; and I also gave him the purport of it in German, and asked him if that was what he wanted. He said, 'Yes.' I then told him, if he would, to sign it. I took his acknowledgment. Miss Hill and I signed it as witnesses. * * *

"*Q.* And his mental condition at that time was what?

"*A.* Sound. He knew perfectly what he was doing.

"I then took the paper, and I told him: 'Now, Mr.

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Williams, you had better think this matter over a day or two. I don't want you to deliver it to your daughter.' I said: 'If you have made up your mind to give your daughter a conveyance of it now, you had better keep it off from record, and deliver it to some one in escrow, to hold and deliver it at the time of your death, because it may be better in that way for your future comfort.' He thought the matter over a while, and he felt as though he wanted to deliver it right away. I said, 'Now, Mr. Williams, you had better think this matter over. In the meanwhile,' I said, 'we will have the power of attorney executed.' As the power of attorney was to me, I couldn't take the acknowledgment, and I went out to find a notary. I couldn't find a notary,—it was along in the afternoon, towards dusk,—and I came back. I says: 'You can't sign this power of attorney over today. You had better go home and think it over, and come back again and let me know what you want done with the deed, and at the same time you can sign the power of attorney.' I told him then that I would suggest to him, instead of delivering the deed at once and having it recorded, to leave it in escrow with me, if he wanted, and I could turn it over to Mrs. Florence Williams at his death. I told him I thought it would insure to him better care than if he parted with his title at once, and I told him to think the matter over until he came back and executed the power of attorney.
* * *

"He came back on the 1st,—on the day the power of attorney is executed. He came back at that time. He came back in the morning. That was two days. He came back alone. My recollection is that when he went away, so that, if there was any question about it, that I could show that it had not been delivered to me in escrow, I told him to take the deed with him. I kept the power of attorney because it hadn't been executed, and, if he changed his mind, there wouldn't be any need of his executing any other paper. I gave him the deed, and told him to think it over, and think of what disposition he wanted to make,—whether he wanted to deliver it at that time. I explained to him that, if he delivered it in escrow, it was an absolute delivery to Mrs. Williams,—she couldn't get it until he died, and he couldn't draw it back; and at the same time I told him to think the matter over, as to whether he wanted to actually make the conveyance. I gave him the instrument. He took it home with him,

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and then, at the time of the execution of this power of attorney, he came back, and he told me that he wanted to deliver the instrument to me in escrow, to hold until he died, and then deliver it to Mrs. Williams."

Decree reversed, and decree entered in this court for the defendant Florence G. Williams, with costs of both courts.

The other Justices concurred.

McKAY v. VAN KLEECK.

133 27
149 1 56

1. RECEIVERS—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK.
The regularity of the appointment of a receiver, as having been made without notice, cannot be questioned by bill filed in a court of concurrent jurisdiction with the court making the appointment.

2. SAME—CONFLICTING RIGHTS—JURISDICTION.
The respective rights of two receivers for the same property, appointed by different courts, should be adjusted by the court which first acquired jurisdiction; and an order of such court authorizing, in general terms, the institution of proceedings to determine the question, should not be construed as contemplating the bringing of suit in another court.

Appeal from Kent; Perkins, J. Submitted December 4, 1902. (Docket No. 147.) Decided April 21, 1903.

Bill by John A. McKay, receiver of the Home Security Life Association, against James Van Kleeck, receiver of the Home Security Association, to determine the respective rights and *status* of said parties. From a decree in favor of complainant, defendant appeals. Reversed.

George W. Weadock, for complainant.

George R. Fox, for defendant.

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MOORE, J. On the 26th of February, 1892, articles of association of the Home Security Association were filed in the office of the Secretary of State. Afterwards it engaged in business. On the 22d of October, 1894, a majority of the members of the Home Security Association adopted amended articles of association, one of which was that the association "shall be known in the law as the Home Security Life Association."

On the 20th of May, 1899, George Mellish filed a bill of complaint, in which was recited the organization of the Home Security Association, and the names of the original incorporators, and that they or some of them managed and controlled the business until on or about January 1, 1899; that said association, in June, 1892, issued to complainant a membership certificate for the sum of $1,000, by which it agreed to pay him $1,000 at the expiration of six years; that he had paid all his assessments and demands, and that there was then due him $1,000; that it had issued many certificates of a like character; that said corporation had become and was insolvent, and unable to pay its debts; that upwards of $75,000 was then due on certificates issued by it, which said corporation admitted it was unable to pay; that its assets were insufficient to pay its liabilities. The bill also stated that the corporation received payments from holders of certificates after its executive board knew it was insolvent, and that it fraudulently continued to do so up to the time of the filing of the bill. The bill further charged that substantially all of the assets of the corporation had, by its officers, been paid to favored holders of certificates, and to those who had paid no consideration therefor, and especially to the Home Security Life Association, a corporation, with knowledge on the part of the officers of the first corporation that it would soon be compelled to suspend business and of its insolvency. The bill recites at length what complainant claims to be illegal and fraudulent action on the part of the defendants. The bill also recites a lack of knowledge as to the names of all the persons who should be made

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defendants, and claims the right, when ascertained, to add their names to the bill of complaint. It prays for an injunction, an accounting, and the appointment of a receiver.

Upon the same day the following order was made:

"State of Michigan.

"In the Circuit Court for the County of Bay, in Chancery.

"George Mellish,
"Complainant,
"*vs.*
"The Home Security Association, Aaron T. Bliss, Levi Tillotson, J. W. Richardson, Richard H. Williams, John W. Foot, Charles L. Benjamin, John F. Barrows, W. E. Ormsby, O. Merton Belfry, G. W. Burnham, Frank Gwizdala, and Fred A. Nichols,
"Defendants.

"On reading and filing the bill of complaint in this cause, on motion of T. E. Webster, solicitor for the complainant, it is ordered that James Van Kleeck be and is hereby appointed receiver of the moneys, property, and effects of the above-named Home Security Association, upon his executing, acknowledging, and filing with the register of this court a bond in the usual form to the people of this State in the penal sum of seven thousand dollars, with sufficient security, to be approved by the register of this court."

Mr. Van Kleeck duly qualified as receiver, and a quantity of notes and mortgages came into his possession as receiver. July 11, 1899, the court entered an order authorizing Mr. Van Kleeck to sell the assets in his hands at auction, which he did, after due notice, for the sum of $5,000. This sale was confirmed by the court August 21, 1899, and the money was paid to Mr. Van Kleeck. October 18, 1899, Mr. Van Kleeck was directed by the court to pay H. S. Stevens $32.50 and Stanley L. Otis $39 for

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personal labor in examining the books and records of the Home Security Association, and these amounts were paid. December 26, 1899, the receiver was directed to pay a claim of L. T. Durand for legal services rendered and money expended for said Home Security Association, amounting to $946.40, and this sum was paid by the receiver.

In February, 1900, Marie M. Best filed a bill against the Home Security Life Association in the circuit court for the county of Kent in chancery, in which she asked for the appointment of a receiver, and John A. McKay was so appointed. Later the following order was entered:

"STATE OF MICHIGAN.

"In the Circuit Court for the County of Bay, in Chancery.

"GEORGE MELLISH,
"Complainant,
"*vs.*
"The HOME SECURITY ASSOCIATION *et al.*,
"Defendants.

"At a session of said court held at the courthouse in the city of Bay City, Michigan, on the 25th day of April, A. D. 1900.

"Present, Honorable Theodore F. Shepard, Circuit Judge.

"The above-entitled petition being brought on to be heard, and after hearing counsel for the respective parties hereto: It is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the said John A. McKay, receiver for the Home Security Life Association, be and is hereby authorized to commence and prosecute such legal proceedings as may seem to him advisable to determine the respective rights and *status* of said James Van Kleeck under his appointment as receiver of the Home Security Association, and said John A. McKay under his appointment as receiver of the Home Security Life Association, and the title to and possession of the funds and property now in the hands of said James Van Kleeck.

"T. F. SHEPARD,
"Circuit Judge."

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Instead of proceeding in the Bay circuit court in chancery to test the validity of Mr. Van Kleeck's appointment, and what rights he possessed thereunder, Mr. McKay, in May, 1900, filed a bill in the circuit court for Kent county in chancery, reciting, in substance, his appointment as receiver of the Home Security Life Association, the appointment of Mr. Van Kleeck as receiver of the Home Security Association, the organization of the Home Security Association, and its reorganization as the Home Security Life Association, and that the Home Security Association ceased to exist, and all its assets passed to the Home Security Life Association. The bill charges that there is no valid order appointing Mr. Van Kleeck receiver, and that by virtue of his appointment he has taken possession of the assets of the Home Security Life Association, and refuses to deliver them over to Mr. McKay. The bill recited the order which had been entered in the circuit court in the county of Bay in chancery, authorizing Mr. McKay to commence suit, and prayed, among other things:

"That this court will adjudge and determine the respective rights and *status* of your orator and of said James Van Kleeck in the premises, and of the property, money, etc., now in the hands of the said James Van Kleeck, or under his control, and to adjudge and determine to whom said money, property, etc., belongs.

"That the said James Van Kleeck may be ordered and directed to pay over to your orator all said money and property now in his hands or custody or under his control as such alleged receiver of said Home Security Association."

Mr. Van Kleeck answered, claiming the benefit of a demurrer, denying any knowledge of the appointment of Mr. McKay as receiver, denying there was any legal reorganization of the Home Security Association, admitting his appointment as receiver by the court in Bay county, and that as said receiver he had assets belonging to the Home Security Association, but not belonging to the Home Security Life Association. The answer denied that the order entered in the chancery court in Bay county author-

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ized the complainant to bring an action against Mr. Van Kleeck in the circuit court for Kent county in chancery, and denied that the last-named court had any jurisdiction over the defendant or the subject-matter of the action.

The case was heard by the circuit court in chancery, and a decree was made in favor of complainant, and requiring, among other things:

"That said defendant, James Van Kleeck, retain in his hands the sum of two thousand and five hundred dollars of the money in his hands as receiver of the Home Security Association, with which to pay said damages, costs, and fees allowed said John A. McKay for services as receiver of the Home Security Life Association."

From that decree the defendant has appealed.

A great many interesting questions are presented by counsel, which we do not deem it necessary to discuss. A bill of complaint was filed in the circuit court for the county of Bay in chancery, which, if true, called for the appointment of a receiver, and a receiver in fact was appointed, who obtained possession of the assets of the company, and who, by direction of the court, has disposed of some of them. It is true it is claimed this appointment is void because the proper notices were not given. On the part of Mr. Van Kleeck it is claimed all the notice necessary was given. Whether this is so or not, the regularity of the appointment cannot be questioned in the manner sought here by appealing to a court having concurrent jurisdiction. In High, Rec. § 112, it is said:

"Under the New York chancery practice, however, if the court below had improperly allowed an *ex parte* application for a receiver, and the appointment was clearly irregular, defendant could not appeal directly from that order, but was required first to apply to the court below to set aside or modify the order; and if, upon a proper application, the court refused so to do, an appeal would then lie from the order denying the application. But upon an appeal from an order appointing a receiver, if the record is silent as to whether due notice of the application was given to defendant, it will be presumed that the court below did not act without proof of notice."

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In section 143 it is said:

"Courts of equity will not permit any unauthorized interference with the possession of their receivers to be justified upon the ground that the appointment was ill-advised or illegal, and that the parties interfering were therefore not bound to regard it. It is sufficient that there is a subsisting order of the court appointing a receiver; and parties dissatisfied therewith, or deeming such order erroneous, must take the proper course to question its validity by application to the court itself, and it is not competent for any person to interfere with the receiver's possession upon the ground that his appointment was improvidently made. The appropriate course in all cases where parties are desirous of obtaining possession of property which has come into the hands of a receiver is to apply to the court from which he derives his appointment; and the rule is not limited to property actually in the receiver's possession, but extends also to property which he has been appointed to receive, but which he has not yet reduced to possession."

See, also, section 163. See, also, *Earle* v. *Humphrey*, 121 Mich. 518 (80 N. W. 370), and the cases there cited.

It is true that, before filing this bill, Mr. McKay obtained permission to commence proceedings to determine the rights and *status* of the two receivers, but there is no suggestion in the petition or in the order itself that this would be done in some other court than the one which appointed Mr. Van Kleeck as receiver. Mr. Van Kleeck's appointment was much earlier than Mr. McKay's. It is said:

"As regards the right of possession when two different receivers have been appointed, in different proceedings, over the same fund or estate, the question of priority or precedence must be determined with reference to the date of appointment, since the courts will not permit both to act, the title of one being necessarily exclusive of that of the other." High, Rec. § 152.

Sometimes there is a conflict between the State courts and the Federal courts. When this occurs, High, Rec. § 50, states the rule as follows:

"Questions of considerable delicacy and importance

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have frequently arisen under our peculiar judicial system touching the relative powers of the State and Federal courts in the appointment of receivers over the same subject-matter in litigation in both tribunals. These questions have usually been determined upon principles of comity, and it is now the established doctrine of both the State and Federal courts that that court, whether State or Federal, which first acquires jurisdiction of the subject-matter or of the *res*, and which is first put in motion, will retain its control to the end of the controversy, and the possession of its receiver will not be disturbed by the subsequent appointment of a receiver by the other court."

The circuit court for the county of Bay in chancery, having first obtained jurisdiction of the subject-matter of the controversy, should retain it. If two courts may at the same time be making orders disposing of one fund, it is difficult to see how the officer of the court in possession of the fund can act with any safety.

The decree is reversed, and one will be entered here dismissing the bill of complaint.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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133 34
137 *230

CARVETH *v.* WINEGAR.

1. MORTGAGES—DEED ABSOLUTE—EVIDENCE.
   In a suit to declare a warranty deed a mortgage, evidence of the circumstances surrounding the transaction, the conversation at the time, and the value of the land, is admissible.

2. SAME.
   A deed absolute in form, accompanied by a contract to return to the vendor one-half of the proceeds of the land if sold within a year, after deducting the amount of an outstanding mortgage, the vendor's debt to the vendee, and the value of certain property deeded by the vendee to the vendor, *held*, under the evidence, to amount to a mortgage.

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3. SAME—INNOCENT PURCHASER.

The existence of an innocent purchaser, who has made improvements, will not prevent the court from declaring a deed absolute in form to be a mortgage, if the purchaser can be fully protected on the accounting.

Appeal from Ionia; Davis, J. Submitted January 15, 1903. (Docket No. 43.) Decided April 21, 1903.

Bill by Thomas Carveth and Marietta Carveth against Clarendon C. Winegar and George Winegar to declare a conveyance absolute in form to be a mortgage, and for an accounting. From a decree for complainants, defendants appeal. Affirmed.

The purpose of this bill is to have a deed absolute upon its face declared a mortgage, and that the complainants may be allowed to redeem therefrom. The deed was executed January 18, 1897, by complainants, who are husband and wife, to the defendant Clarendon C. Winegar. It was executed at the house of defendant Clarendon. Mr. Winegar and Mr. Carveth then went to the house of Mr. Winegar's attorney, and a contract was drawn up, the material part of which is as follows:

"It is agreed by said Winegar and said Carveth that in the event of the sale of said farm at any time before the 1st day of April, A. D. 1898, for a sum greater than the mortgage and accrued interest now on said premises, and the interest thereon from this date to date of said sale if made, taxes, and expenses attendant upon said sale; also the expense of any permanent improvement made by or through first party on said premises, and, further, the reasonable expense of putting in crops that may not be harvested at time of sale added to the other items heretofore mentioned; or, further, if said Winegar in the meantime shall have leased said premises, the expense of buying off said leaseholder shall be added,—then said Winegar, after deducting from the amount of money and securities, if any, received from said sale, shall and hereby agrees to pay to said Carveth one-half of what remains after deducting the several items above set forth.

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"It is expressly understood and agreed by the parties hereto that these presents are to be construed and understood as a separate and distinct transaction, and independent from the sale of said lands by Carveth aforesaid to Winegar aforesaid, and in no way to affect the conveyance by warranty deed herein referred to.

"It is mutually agreed that the crops grown on said premises, after deducting expense incident to raising and marketing them, or the value thereof, shall be deducted from the items of expense heretofore mentioned.

"It is further mutually agreed that said Winegar shall deduct from the proceeds of the sale of said farm the sum of four hundred dollars for the value of one certain house and lot this day deeded by Winegar to said Carveth, together with interest on said $400."

The land was a farm of 160 acres. In 1893 it was mortgaged to one Anderson for $5,000. Mr. Carveth desired to take up this mortgage, which drew 7 per cent., and replace it by another at 6 per cent. Mr. Winegar wrote to his sister and brother-in-law in New York, March 22, 1893, that he had an opportunity to loan $4,000 on "one of the best farms in this part of the country. It is a farm of 160 acres, and would sell for $8,000 under the hammer." The loan was secured, the mortgage given, and Mr. Winegar took a second mortgage for $500 to help make up the amount necessary to pay the Anderson mortgage. This second mortgage was afterwards paid. Mr. Carveth paid the interest for 1894 and 1895. He was an old man, the crops for 1896 and 1897 were poor, and he was unable to meet the interest. Mr. Winegar paid the interest due in 1896, and took a chattel mortgage on a large amount of personal property to secure him. Efforts were made by both parties to sell the farm. It is claimed by the defendants that the price fixed by Mr. Carveth was too high, and that for that reason a sale was not made. Complainants charge that Mr. Winegar did not act in good faith, or make proper efforts to secure a sale. On the 8th day of February, 1898, in consideration of the sum of $100 to him paid by Winegar, Carveth released his interest in the contract, and signed a relinquishment thereof, which is

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indorsed on said contract. Defendant George is the son of Clarendon, and purchased one-half of this farm from his father for $3,000, and is now in possession thereof, claiming to have made considerable improvements in reliance upon the validity of the title obtained by the deed from complainants to his father.

Outside of the terms of the deed and the contract, the testimony is in direct conflict. The testimony of the complainants, if true, makes the transaction a mortgage. The testimony of defendants, if true, makes the transaction an absolute sale, in trust, however, to be sold within the time fixed by the contract. Mr. Winegar testified:

"I told him [Mr. Carveth] I had a house and lot in Lowell I would give him for the place,—that is, and take security, what there was against the place,—and he could deed the place to me; I would take his place. And then I told him, in the course of a year, whatever I would sell the place for over and above what I had in it and expenses, I would give him one-half, and we would make as good a sale as we could."

The total amount due on the mortgage, together with interest paid by defendant Winegar, at the time the deed was executed, was about $4,700.

The court rendered a decree for the complainants, and an accounting to ascertain the amount due.

John Nichol (*Allen B. Morse*, of counsel), for complainants.

S. P. Hicks and *R. A. Hawley*, for defendants.

GRANT, J. (*after stating the facts*). We think there was ample testimony to sustain the conclusion reached by the circuit judge, and we see no reason for overruling that conclusion. The question is one entirely of fact. The circumstances under which the deed and contract were made, the conversation at the time, and the value of the land were competent evidence, under the decisions, to show that the transaction was intended by the parties to be a mortgage. If the title passed to Mr. Winegar, under his

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own testimony, as well as under the contract, he took the property in trust to sell for the purpose of paying up his own debt and that of the mortgage to his brother-in-law, and to pay one-half of the surplus to Mr. Carveth.

This case comes within the rule that "in all doubtful cases the law will construe the contract to be a mortgage, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression." *Edrington* v. *Harper*, 3 J. J. Marsh. 354 (20 Am. Dec. 145). In a case somewhat similar in its facts, the court held that:

"The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered, and never intended to reclaim, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands." *Villa* v. *Rodriguez*, 12 Wall. 323.

We think the case comes clearly within the rule of *Sowles* v. *Wilcox*, 127 Mich. 166 (86 N. W. 689). See, also, *Stephens* v. *Allen*, 11 Or. 188 (3 Pac. 168); *Russell* v. *Southard*, 12 How. 139; *Wharf* v. *Howell*, 5 Bin. 499; *Strong* v. *Stewart*, 4 Johns. Ch. 167; 1 Jones, Mortg. § 271. It is unimportant to state the details of the evidence. The facts in *Sowles* v. *Wilcox*, *supra*, are fully stated, and the facts in this case are sufficiently similar to those in that case to justify the holding that that case rules this.

It is urged that defendant George has made improvements upon this land in good faith in reliance upon his title. If so, he is entitled to compensation therefor, and his rights can be fully protected upon the accounting.

The decree is affirmed, with costs.

The other Justices concurred.

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SPENCER v. TERRY'S ESTATE.

133 39 146 473
133 39 f149 161
133 39 f151 517 151 608

1. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.
   On a will contest, evidence of testator's mental condition both before and after the time when the will was executed is admissible to show a want of testamentary capacity, notwithstanding all of the testimony of those present at its execution tends strongly to show that testator was then competent.

2. SAME.
   On a will contest, the attorney who drew the will was asked on cross-examination, "And you did not suggest to testatrix that she was giving all her household belongings and pictures to the library association?" *Held*, that the question was not improper.

3. SAME—TRIAL—OBJECTIONS TO TESTIMONY.
   On further cross-examination the witness was asked, "You state to this jury you allowed her to will her personal belongings to the library association, without saying a word to her?" The question being objected to as argumentative, witness offered to state his reasons for having said nothing; whereupon the court remarked that the question *was* "somewhat argumentative," and that witness had better give his reasons. *Held*, that, no objection having been made that the question improperly suggested that testatrix was under witness' control, and the court having recognized the force of the only objection that was urged, and permitted witness to pursue the course he desired, there was no error.

4. SAME.
   An objection to testimony that testatrix was in the habit of using morphine, on the ground that such habit "would have no effect whatever upon the question of mental capacity," did not entitle proponent to urge on appeal that the testimony was improperly admitted because there was no proof that morphine would make one incompetent to make a will, or that testatrix was under its influence at the time the will was executed.

5. SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES.
   An instruction that, if the attorney who drew the will had testified truthfully, the will must stand, was properly modified by adding that the jury should take his testimony, and "all

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the testimony in the case which they believed to be credible," and then say whether the attorney had testified truthfully and reliably; there being testimony legitimately tending to show that testatrix was mentally incompetent at the time of the execution of the will.

6. SAME—EXCLUSION OF RELATIVES—NATURAL JUSTICE.
Testatrix was 70 years of age when the will was executed. Her sole heirs consisted of two sisters and a brother, who lived some distance away, and between whom and herself there had been some bitter feeling. *Held*, that the fact that she bequeathed the bulk of her property to a public library had no tendency to show a lack of testamentary capacity, and that it was error to instruct the jury that it might be considered in determining that question in case they should regard such action as contrary to natural justice.

7. SAME—CURING ERROR.
Error in so instructing was not cured by a subsequent instruction that testatrix had the right to dispose of her property as she saw fit, and that it was not in itself an indication of mental incapacity for her to leave the bulk of her property to a charitable or public institution, to the exclusion of her relatives.

8. SAME—SPECIAL QUESTIONS.
Proponent requested the submission to the jury of a special question as to whether, when testatrix handed her lawyer a memorandum of her will, she knew what she was doing. In submitting the question the court said that he supposed it meant, "Was she mentally competent?" *Held*, that, as proponent had no right to submit a question not calling for an answer which would control the main issue, he could not complain of the construction placed upon the question by the court.

Error to Berrien; Coolidge, J. Submitted February 17, 1903. (Docket No. 83.) Decided April 21, 1903.

George F. Sonner presented for probate the last will and testament of Melissa E. Terry, deceased. The will was allowed in the probate court, and Charles A. Spencer and others appealed to the circuit. From a judgment for contestants, proponent brings error. Reversed.

Cady & Andrews and *I. W. Riford*, for appellant.

Gore & Harvey, for appellees.

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CARPENTER, J. Proponent asks this court to reverse a verdict and judgment denying probate to an instrument purporting to be the last will of Melissa E. Terry, deceased. The material facts are stated in the opinion rendered when this case was before the court on a former occasion. See *Spencer* v. *Terry's Estate*, 127 Mich. 420 (86 N. W. 998).

While the proponent produced witnesses who were present when the will was made, and whose testimony tended very strongly to prove testamentary capacity at that time, the witnesses produced by contestants testified to observations made before and after said will was made. Many of proponent's objections relate to the admissibility and sufficiency of this testimony of contestants. Complaint is made that many of contestants' witnesses were permitted to express an opinion adverse to testatrix's testamentary capacity without having testified to facts and circumstances warranting that opinion. It is sufficient to say that each of those witnesses whose testimony was admitted in evidence against the objection and exception of proponent, under the rule applied by this court in *Prentis* v. *Bates*, 88 Mich. 567, and 93 Mich. 234 (50 N. W. 637, 53 N. W. 153, 17 L. R. A. 494), did testify to facts and circumstances warranting the expression of the opinion complained of.

It is also contended that testatrix's lack of capacity to execute the will on February 17, 1899, could not be established by evidence of her condition before or after that time. Proponent makes this claim because in the case of *Lange* v. *Wiegand*, 125 Mich. 647 (85 N. W. 109), this court said, speaking of the condition of a testator failing rapidly from a stroke of paralysis, several hours after he had made his will:

"What his condition was at that time could not be weighed against the testimony of witnesses, who stood unimpeached, as to the condition when the will was made."

It was not meant by this expression to cast any doubt upon the rule, settled alike by reason and authority, that testatrix's lack of capacity to execute a will at a particular

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time may be proved by her condition before and after that time, if that prior or subsequent condition may be presumed to exist at the time the will was made. See *Harring* v. *Allen*, 25 Mich. 505, and *Haines* v. *Hayden*, 95 Mich. 332 (54 N. W. 911, 35 Am. St. Rep. 566). The quotation relied upon in the opinion in *Lange* v. *Wiegand* was a statement warranted by the facts in that case, and was not intended to apply to another and different case. To apply that principle to this case, it is necessary for proponent's counsel to maintain—and they do maintain—that the facts testified to by Mr. Plummer, who drew the will and witnessed its execution, not only establish the competency of the testatrix to make the will, but that they cannot be discredited by the testimony of witnesses who saw the testatrix before and after that time. We cannot agree with this contention. Contestants' witnesses testify to facts and circumstances, and opinions properly based thereon, which justify the jury in finding that testatrix lacked capacity to make the will in question during a period commencing some time before it was made, and continuing to her death. If it is true that it is a necessary inference from Mr. Plummer's testimony that testatrix possessed testamentary capacity when the will was made, it must be and is true that the jury might discredit that testimony, if they were convinced by the testimony of contestants that she did not possess testamentary capacity at that time. We think, therefore, as above indicated, and as indicated in the former opinion in this case, that there was sufficient evidence of lack of mental capacity to support the verdict in this case.

On the cross-examination of Mr. Plummer, he was asked: "And you did not suggest to her, when you were discussing with her the last clause of that will, that she was giving all her household belongings and pictures to the library association?" Complaint is made that the court did not sustain proponent's objection to this question, that it made no difference "whether he suggested it or not." We think this question was not improper, and that the ruling of the

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court was correct. Mr. Plummer was then asked: "You state to this jury you allowed her to will her personal belongings—pictures, silver, household treasures—to the library association, without saying a word to her?" After the witness had answered, "I do," proponent's counsel objected to the question as argumentative. Witness thereupon said, "If you want to know the reason, I can tell you the reason," and the court thereupon said: "It *is* somewhat argumentative. I think we had better have his reasons." The only objection which we think could properly have been made to this question was that it improperly suggested that testatrix was under the control of the witness, or that he was under an obligation to control her. That objection was not urged when the testimony was admitted, and, the court having recognized the force of the only objection that was urged, and permitted witness to pursue the course he desired, we must hold there was no error.

Complaint is made that the court did not strike from the record the testimony of witnesses to the effect that testatrix was in the habit of using morphine. The particular testimony referred to related to testatrix's habit in 1891. The testimony was introduced against proponent's objection that it was too remote from the date of the execution of the will, and that the habit of using morphine "would have no effect whatever upon the question of mental capacity." It was admitted, notwithstanding this objection, upon the statement of contestants that they were going to show that testatrix continued to use it, and that they had already introduced testimony to that effect. Proponent's counsel, in their brief, urge that the testimony should have been stricken out, because "there was no proof, nor any attempt to prove, that morphine will make a person incompetent to make a will," and because "contestants produced no proof to show testatrix to have been under the influence of morphine at the time she executed the will." Neither of these objections was made at the time the testimony was introduced, nor, so far as the

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court can learn from an examination of the record and briefs, at any time thereafter. We must decline, for these reasons, to determine their validity.

In his charge to the jury the court made a brief statement of the substance of Mr. Plummer's testimony in a manner not complained of by proponent, and then stated:

"Now, gentlemen, if Mr. Plummer, in the statement of facts which I have briefly summed up, has testified truthfully and reliably, then this will must stand. Now, you may take the testimony of Mr. Plummer and Mrs. Gurd, and take all the testimony in the case which you believe to be credible, and then say whether Mr. Plummer has testified truthfully and reliably in the case."

Complaint is made of the last sentence of this charge, as "erroneous, unjust, and uncalled-for." The preceding sentence was in accord with proponent's position in the court below and in this court. Yet it could not possibly be given, under the correct rule, as indicated in this opinion, unless it was coupled with the sentence complained of, or some similar sentence. Under these circumstances it was proper for the court to give the charge complained of.

The court charged the jury at the request of contestants:

"The deceased left surviving her, as next of kin, a brother and two sisters; and if you find that the sixth clause of the will, bequeathing the larger portion of the estate to the public library, is contrary to natural justice, this may be taken into consideration by you in determining the competency of the testatrix to make it."

In the case of *Rivard* v. *Rivard*, 109 Mich. 98 (66 N. W. 681, 63 Am. St. Rep. 566), this court held that it was not error to charge the jury that they "may consider the nature and character of the will, and, if it be contrary to natural justice, this, with the other facts of the case, may be considered by the jury in the determination of the question whether or not the testator was of sound mind." The facts which justified that charge clearly appear in the

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opinion of the court, which approves it, and which we quote:

"The testator's daughter Rose was about 12 years of age when her mother died. The evidence for contestants showed that she assumed the mother's place in the household; did most of the work; she and her little sister milked the cows, and brought water from the lake, several hundred feet away; that she was faithful, obedient, and uncomplaining; that her lot was a hard one; that she did work which no father, possessed of the property which her father had, ought to permit a daughter to do. * * * Either from an unfortunate marriage or from other causes, the mind of his daughter Archange had become unbalanced, and after she left her husband her father took her to an asylum for care and treatment. The common sense of mankind condemns, as contrary to natural justice, a will which practically disinherits such children, and leaves the bulk of a large fortune to two who have done no more than they to deserve it, and are better able to meet the vicissitudes and struggles of life; and courts and juries have the right to take that fact into consideration in determining the competency of the testator to make the will."

In *McGinnis* v. *Kempsey*, 27 Mich. 363, it was held that the following charge was not erroneous:

"If a party makes a will contrary to natural justice, this, with other facts, may be considered. But the mere fact that a will is not exactly according to what our own conceptions of justice would be, is not, of itself, sufficient to invalidate a will, for the reason that sane men are known to disagree in this respect. By 'natural justice' we mean that which is founded in equity, in honesty and right. Natural justice requires that the parent shall care for his children. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child, who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. There are other relations in the history of every individual out of which obligations grow, but which are so varied, and embrace so wide a range, that human tribunals cannot and do not attempt to enforce them. And wherever the question is presented as to whether a natural obligation has been created, it can

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only be by inquiring what honor or conscience dictates. But in determining a case like this—what conscience dictates—we are not to consider alone the fact that this person or that person is a blood relation of the testator. Even under the civil law, where a parent was not allowed to disinherit his child without giving his reasons therefor, —and the law recognized 14 reasons, either one of which was deemed sufficient to absolve the parent from what, without such reason, would be deemed an obligation founded on natural justice,—in short, the conduct of the child towards the parent was to be considered in determining the question as to whether natural justice required the parent to confer any portion of his property upon the child. Did the child refuse to aid the father, and to give him his services, and did he refuse to reverence his authority, natural justice did not require the father to treat the child, in disposing of his property, any different from strangers."

These quotations prove that neither the case of *Rivard* v. *Rivard* nor *McGinnis* v. *Kempsey* is an authority for the giving of the charge now under consideration. It sufficiently appears from these cases that the circumstances must be extraordinary to justify the inference of testamentary incapacity merely because an heir is disinherited. Even when a child was disinherited (and the relation of parent and child is much closer than that between brothers and sisters) this court has never gone further (and that in a very exceptional case) than to say that this circumstance may be considered *with the other facts in the case* in determining testamentary capacity. The charge under consideration contains no such qualification. We think this charge clearly authorized the jury to find lack of testamentary capacity from the fact that testatrix bequeathed the bulk of her property to a public library, to the exclusion of her next of kin, provided they believed such bequest to be contrary to natural justice. It is true that the court gave the following requests of proponent:

"You are instructed that the testatrix had the right to dispose of her property as she saw fit, and it is in itself not

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an indication of mental incapacity to leave the bulk of her property to a charitable or public institution, to the partial or total exclusion of her relatives."

"A testatrix may dispose of her property as she pleases, and it is not an indication of mental incapacity that she distributes it partially among her relatives, and leaves the balance to some one else."

The most favorable construction for contestants to be placed on these requests of proponent is to assume that the bequest to the charitable institution, to the exclusion of the next of kin, under no circumstances affords evidence of lack of testamentary capacity. Assuming this construction to be correct, it follows that these instructions, given at the instance of proponent, are inconsistent with the charge under consideration. As the court cannot say which of two inconsistent instructions the jury followed, the giving of proponent's requests would not cure the error, if error there was, in giving the request of contestants under consideration. The fact that testatrix bequeathed the bulk of her property to the public library, rather than to her brother and sisters, afforded no evidence whatever of her lack of testamentary capacity. She was 70 years of age, living in the city of Benton Harbor, Berrien county, Mich. Her two sisters lived in Chicago, Ill., and her brother in Benton, Mich. There had been litigation, which tended to embitter them, and their relations were not intimate at the time the will was made. Testatrix's disregard of their claims was certainly not, under these circumstances, contrary to natural justice, and afforded no evidence of a lack of testamentary capacity.

Proponent submitted to the jury the following special question: "When Mrs. Terry, on February 17, 1899, handed to Mr. Plummer a memorandum of her will, written in her own handwriting, and directed him how to dispose of the balance of her property, did she know what she was doing?" Complaint is made because, in submitting this question to the jury, the court said, "'Did she know what she was doing?' I suppose that means, 'Was

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she mentally competent?'" While proponent's counsel had insisted, just before this comment was made, upon their privilege to submit such questions as they desired, they made no objection and took no exception to the remark of the court. Nor do we think that the remark was improper. Proponent had no right to submit a question not calling for an answer which would control the main issue. *Balch* v. *Railroad Co.*, 78 Mich. 654 (44 N. W. 151); *Crane* v. *Reeder*, 25 Mich. 304; *Cousins* v. *Railway Co.*, 96 Mich., at page 389 (56 N. W. 14). Unless their question received the construction placed upon it by the court, it should not have been submitted. They cannot complain, therefore, of that construction.

For the error pointed out, the judgment will be reversed, and a new trial granted.

The other Justices concurred.

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BERRIEN SPRINGS WATER-POWER CO. *v.* BERRIEN CIRCUIT JUDGE.

1. CONSTITUTIONAL LAW—EMINENT DOMAIN—WATER POWER.
   It is beyond the power of the legislature to authorize the condemnation of land for the purpose of creating a water power which, when erected, may be used for public or private purposes at the option of the proprietor. So *held* where the corporation claiming such right was organized to sell and supply water and water power for mining, milling, manufacturing, domestic, municipal, and agricultural purposes, and to furnish people in the vicinity with electricity.

2. SAME—PRIVATE USES.
   Land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved; but in such case the taking must be limited to the public necessity.

3. SAME—NAVIGABLE WATERS—DAMS—PUBLIC NECESSITY.
   The fact that the construction of a dam will result in improv-

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ing the navigability of a stream does not establish the public necessity for taking lands that will be flooded as the result of such project, but the question of necessity must be determined by a jury, as in other cases.

4. SAME.

2 Comp. Laws, § 6814, subd. 6, purporting to authorize corporations organized under the act of which it is a part to condemn land for the construction of a navigable waterway, with appurtenant water power, which may be used for private purposes, but containing nothing to indicate that the public necessity for the waterway shall limit the exercise of such right, is unconstitutional.

Mandamus by the Berrien Springs Water-Power Company to compel Willis B. Perkins, circuit judge, presiding in Berrien county, to vacate an order dismissing a petition to condemn certain land. Submitted February 17, 1903. (Docket No. 209.) Writ denied April 21, 1903.

Fred A. Baker (*O'Hara & O'Hara* and *Fred P. Delafield*, of counsel), for relator.

M. L. Howell and *G. M. Valentine* (*Benton Hanchett*, of counsel), for respondent.

CARPENTER, J. In *Valentine* v. *Berrien Springs Water-Power Co.*, 128 Mich. 280 (87 N. W. 370), this court held that relator had a right to proceed to erect a dam across St. Joseph river. To carry out this project, relator filed a petition to condemn certain lands in pursuance of authority contained in the act under which it is incorporated. Respondent dismissed said petition on the ground that that part of the act which authorized relator to condemn lands was unconstitutional. This court is now asked to issue a *mandamus* compelling the vacation of such order. While other questions are raised in this case, they will receive no attention, because, in our opinion, the decision of respondent was correct.

Relator was incorporated under Act No. 202 of the Public Acts of 1887, the same being found in 2 Comp.

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Laws, §§ 6806–6822, inclusive. Section 1 of said act (2 Comp. Laws, § 6806) reads as follows:

"Any number of persons, not less than five, may form themselves into a corporation for the purpose of damming any stream, and of excavating and constructing, maintaining, repairing, and improving any canal already existing, or which they may wish to excavate and construct, with water power appurtenant thereto, and may own, lease, use, and control the same for the purpose of accumulating, storing, conducting, selling, furnishing, and supplying, upon an agreed rental, water and water power for mining, milling, manufacturing, domestic, municipal, and agricultural purposes, and for purposes of navigation."

Section 9 (2 Comp. Laws, § 6814), subd. 6, reads as follows:

"In any case where the company is unable to agree with the owners of land needed for or in the work of constructing a navigable waterway, as herein provided, or cannot agree with any highway commissioner, or other authority, as to the crossing or changing of roads, streets, or streams, then and in all such cases the same laws providing for the incorporation of railroad companies, and providing for the condemnation of lands to the public use in certain cases, shall govern and be the rule of action or procedure so far as practicable; and any company undertaking to construct a navigable waterway, with or without water power appurtenant thereto, and intending to do a transportation business upon such waterway, shall have the same rights and privileges for procuring right of way, needed lands, or real estate of any kind, or of crossing streams and highways, as the laws of Michigan allow railroad companies."

Section 11 (2 Comp. Laws, § 6816) reads as follows:

"Such company may furnish water to other persons or companies for mining, manufacturing, milling, domestic, municipal, or agricultural purposes, on such rent as shall be agreed upon by and between it and those desiring to obtain it, or it may use the same for such purposes itself in any class of manufacturing purposes. It is authorized to bring suit to enforce the payment of such rent in any proper court of the county where its principal office is located."

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Relator's articles of incorporation, as amended, specify its business and objects as follows:

"1. To construct and maintain a dam across the St. Joseph river, at or near the village of Berrien Springs, in said county of Berrien, and raise the water in said river from the village of Berrien Springs to the village of Buchanan, and thereby make said river between said villages a navigable waterway.

"2. To excavate, construct, and maintain canals and channels through the bars and shoals in said river, and thereby further improve the navigability of said river.

"3. To construct, maintain, and operate water power appurtenant to said dam and waterway, and to own, lease, use, and control the same for the purposes of accumulating, storing, conducting, selling, furnishing, and supplying, upon an agreed rental, water and water power for mining, milling, manufacturing, domestic, municipal, and agricultural purposes, and for purposes of navigation; and also to produce and supply the village of Berrien Springs and the inhabitants thereof, and the inhabitants of said townships of Oronoko, Berrien, and Buchanan and the vicinity thereof, with electricity for lighting, heating, and motive purposes, for which the same is or may become of practical use; and to acquire, hold, lease, and convey lands or water power, as may be necessary or convenient for the purposes above specified.

"4. To do a transportation business upon such waterway."

In its petition for condemnation, relator alleges that it requires the lands proposed to be condemned "for the purposes of its incorporation, and that the taking thereof is necessary for the public use and benefit."

Relator is, then, by these proceedings, seeking to condemn land which will be overflowed as a result of its damming St. Joseph river, a navigable waterway. Relator's project is to make the stream navigable—or, to be more accurate, to improve its navigability—for the double purpose of carrying on a transportation business and to obtain a water power. This water power relator will own, lease, use, and control for the purposes heretofore indicated in the law and in its articles of incorporation. While

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some of these purposes may be public, it is clear that many of them are private. See *Ryerson* v. *Brown*, 35 Mich. 333 (24 Am. Rep. 564). After the water power is erected, though it may be used for a public purpose, relator has the option to use it entirely for private purposes. Says the supreme court of Wisconsin in a similar case:

"And it is equally certain that if the power be alternative and optional, either for a public or for a private use,—to construct a dam, to be used, when constructed, either for the purpose of waterworks or for the purpose of leasing the water power for manufacturing purposes, in the discretion of the city,—it cannot be upheld. It seems too plain for discussion that if the legislature grant an equivocal power, subject to the election of the grantee, for either one or other of two purposes, the one lawful and the other unlawful, the power cannot be upheld upon the chance of its being lawfully applied." *Attorney General* v. *City of Eau Claire*, 37 Wis., at page 437.

It results from this reasoning, which meets our approval, that we are bound to regard said water power as private in its character, and to hold, therefore, that, under our Constitution, land cannot be taken for the purpose of creating it.

If relator has the power of condemnation in this case, it obtains the same by subdivision 6 of section 9, heretofore quoted, and by that part of said subdivision which reads as follows:

"And any company undertaking to construct a navigable waterway, with or without water power appurtenant thereto, and intending to do a transportation business upon such waterway, shall have the same rights and privileges for procuring right of way, needed lands, or real estate of any kind, or of crossing streams and highways, as the laws of Michigan allow railroad companies."

Assuming, but without deciding, that this language is broad enough to authorize condemnation in cases where it is sought to improve the navigability of a stream already navigable, the question arises whether the statute is constitutional, when the land is taken, as in this case, where

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the improvement of the navigability is intended to secure water power to be used for private purposes, as well as to enable the carrying on of a transportation business.

Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it. *Ryerson* v. *Brown*, 35 Mich. 333 (24 Am. Rep. 564); *Board of Health* v. *Van Hoesen*, 87 Mich. 533 (49 N. W. 894, 14 L. R. A. 114). It follows from the above principle, as well as from general reasoning, that, where the corporation intends to devote said land both to public and private uses, only so much can be taken as is necessary to the public use. See Cooley, Const. Lim. (6th Ed.) 664. In this case relator proposes to improve the navigability of a stream for the double purpose of carrying on a transportation business, which we may admit to be public, and for the purpose of furnishing water power, which it may own, lease, and use for private purposes. The statute authorizes a company constructing a navigable waterway, with water power appurtenant, to take the "needed lands or real estate." This obviously, in form at least, grants relator the right—and by its petition we are bound to say it asserts the right—to take such land as is needed in its work of constructing "a navigable waterway, with water power appurtenant thereto." Though, under the law, no more land may be taken than will improve the navigability of the stream, so much will be taken as is necessary to make a navigable waterway, with private water power appurtenant thereto. The taking is not limited to what is required by the public necessities in the improvement of the navigability of the stream, and the law contains no provision by which the taking can be limited to such public necessities. While many public advantages may result from improving the navigability of the stream, the only one indicated in the statute is the transportation business to be carried on. Inasmuch as the statute is silent as to the character of such transportation business, it is clear that its demands

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and necessities in no way limit the taking of the land. It is equally clear that the necessity of other public uses (not specified in the statute) of the improved navigability of said stream does not limit such taking.

Is the statute, which authorizes the taking of such land as is needed in the work of improving a navigable waterway with water power appurtenant thereto, a valid, constitutional enactment? It may easily happen—indeed, it is quite probable—that the appurtenant water power may require a higher dam, and, consequently, a taking of more property, than is demanded by the transportation business to be carried on, or by any other public necessity for said navigable waterway. If the fact that the taking results in improving the navigability of a stream proves said taking to be a public necessity, the statute is constitutional, notwithstanding the fact that one of the purposes of improving the navigability of the stream is to obtain a water power; for land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved. *Toledo, etc., R. Co.* v. *East Saginaw, etc., R. Co.*, 72 Mich., at page 227 (40 N. W. 436); *South Chicago R. Co.* v. *Dix*, 109 Ill., at page 243. But it cannot be said, nor is it true, that, because the taking results in improving the navigability of a stream, its public necessity is thereby proved. Under the Constitution of Michigan, art. 18, § 2, the necessity for the taking, as well as the compensation for the property, must be determined by a jury, or by commissioners appointed by a court of record. This constitutional tribunal, and not the legislature, must determine whether public necessities require this improvement in the navigability of St. Joseph river. *Powers' Appeal*, 29 Mich., at page 510. It cannot be said, as a matter of law, that public necessity requires improvements to be made in a navigable river, any more than it can be said, as a matter of law, that public necessity requires a railroad to be built. See *Mansfield, etc., R. Co.* v. *Clark*, 23 Mich. 524.

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The fact that, under this law, land cannot be taken until the public necessity therefor has been determined by the tribunal to whose determination that matter is by the Constitution submitted, does not answer the objections to its constitutionality. The question submitted to that tribunal will be substantially as follows: Does public necessity require that the land specified in relator's petition shall be taken to so improve the navigability of St. Joseph river that relator can operate thereon a transportation business and can obtain thereby the water power it desires? The question of public necessity thus submitted is not confined to the public necessity requiring the improvement of the navigability of the river, but extends also to the necessity requiring the construction of a water power, which, as has already been shown, this court is bound to declare private in its character. The constitutional tribunal for condemning land cannot find that public necessity requires a taking for private purposes. *Ryerson* v. *Brown*, 35 Mich. 333 (24 Am. Rep. 564). Yet by the act under consideration that tribunal is authorized to make such a finding, and, by making it, take property for a private purpose.

The act is, therefore, unconstitutional, and relator's prayer for a *mandamus* must be denied.

The other Justices concurred.

In re STEGENGA.

1. CRIMINAL LAW—DISORDERLY PERSONS—VAGRANCY—COMPLAINT—SUFFICIENCY.

   A complaint alleging that defendant was found loitering about in common barrooms, and wandering about the streets, by day and by night, without any lawful means of support, and without being able to give a satisfactory account of himself,

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for a period of two weeks, in violation of a city ordinance relating to disorderly persons, did not purport to charge defendant with vagrancy, and was therefore not objectionable for failure to allege such offense.

2. SAME—ORDINANCES—AUTHORITY OF CITY COUNCIL.
A charter provision authorizing the common council to provide by ordinance for the punishment of "disorderly persons of all kinds" should be construed in its ordinary sense, and not as limiting the authority of the council to legislate with reference to such conduct as would be regarded as disorderly under the general statute (2 Comp. Laws, § 5923) or the common law.

3. SAME—COMMON-LAW OFFENSE.
It seems that one shown to have been loitering about the streets of a city and in barrooms in idleness for two weeks, without apparent habitation, and without any means of support, giving no satisfactory explanation of his conduct, would be punishable as a disorderly person at common law.

4. SAME—ORDINANCES—REASONABLENESS—PERSONAL LIBERTY.
A city ordinance declaring that any person found loitering in any barroom, or wandering about the streets, without any lawful means of support, or without being able to give a satisfactory account of himself, shall be deemed a disorderly person, and punishable as such, is not void as an unreasonable abridgment of the right of personal liberty.

Habeas corpus proceedings by William Stegenga to obtain his release from the Kent county jail. Submitted April 7, 1903. (Calendar No. 19,889.) Writ dismissed April 21, 1903.

H. Everett Moorman, for petitioner.

S. W. Barker, Assistant City Attorney of Grand Rapids, for respondent.

HOOKER, C. J. The defendant was charged with being a disorderly person, within the provisions of an ordinance of the city of Grand Rapids, and, upon a trial by jury in the superior court of that city, was convicted and sentenced. He is before this court on *habeas corpus*. The return shows that he is detained by the sheriff of Kent

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county under the command of a commitment from said court, reciting that he was "convicted of having been found loitering about in common barrooms, and wandering about the streets, by day and by night, without any lawful means of support, and without being able to give any satisfactory account of himself, at the city of Grand Rapids, for the period of two weeks." Copies of the complaint, judgment, and commitment are attached to the return.

Section 10 of title 3 of the charter of Grand Rapids provides that:

"The common council shall have power, within said city, to enact, make, continue, establish, modify, amend, and repeal such ordinances, by-laws, and regulations as it deems desirable within said city, for the following purposes: (1) To prevent vice and immorality, to preserve public peace and good order, and to prevent and quell riots, disturbances, and disorderly assemblages; * * * (20) to provide for the punishment of vagrants, and all persons drunk or *disorderly* on the streets or public places of the city; * * * (34) to punish common prostitutes, and *disorderly persons of all kinds.*"

The ordinance in question is as follows:

"An Ordinance to Amend Section 1 of an Ordinance Entitled 'An Ordinance Relative to Disorderly Persons in the City of Grand Rapids.'

"The common council of the city of Grand Rapids do ordain as follows:

"SECTION 1. That section 1 of 'An Ordinance Relative to Disorderly Persons in the City of Grand Rapids,' as amended October 28, 1901, be and the same is hereby amended to read as follows:

"SECTION 1. Any person who shall have actually abandoned his wife, child, or children, or either, or who neglects or refuses to provide for his family, wife, child, or children; all persons who shall make any improper noise, disturbance, or riot, or shall be engaged in any illegal or improper diversion, or shall use any indecent, insulting, or immoral language, or shall be guilty of any indecent or immoral conduct or behavior in any place in the city of Grand Rapids; all tipplers, drunkards, and common prostitutes; all persons who shall collect in crowds and

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bodies for unlawful and mischievous purposes in any place in said city, to the annoyance or inconvenience of citizens or others, and all persons found in a state of intoxication in any place whatever in said city; any person who shall willfully assault another in said city, or be engaged in or aid or abet in any fight, quarrel, or other disturbance in said city; any person who shall make any indecent exposure of his or her person in any street, lane, alley, or elsewhere in said city; all persons that collect or stand in crowds in front of or about any church or place of worship in said city, during service, or the gathering or the departing of the congregation, or that collect or stand in crowds or loiter about or obstruct free and uninterrupted passage on any sidewalk in said city, or in any hall, stairway, vestibule, or passage-way leading to any store, office, court-room, or public hall or building in said city; all persons that stand, loiter, or stroll about in any place in said city, awaiting or seeking an opportunity to obtain money or other valuable thing from others by trick or fraud, or to aid or assist therein; all persons that shall engage in any fraudulent scheme, device, or trick to obtain money or other valuable thing in any place in said city, or aid or abet, or in any manner be concerned, therein; all ropers, steerers, or cappers, so-called, for any gambling room or house, or for any gambling game, trick, or device, or who shall engage in any such practice in any public streets in said city; all persons found loitering about in any hotel, block, common barroom, dram-shop, gambling house, or disorderly house, or wandering about the streets, either by night or day, without any lawful means of support, or without being able to give a satisfactory account of himself or herself; and all persons that show, sell, or offer for sale or exhibit any indecent or obscene picture, drawing, engraving, book, or pamphlet in said city,—shall be deemed disorderly persons, and, upon conviction thereof, shall be punished as provided in section 7 of this ordinance."

It is contended that the complaint fails to charge a punishable act, and that the ordinance is void, and beyond the authority of the common council to enact. It is urged: *First*, that it attempts to charge vagrancy, and nothing else, and that the allegations of the complaint fail to conform to the settled definition of vagrancy; reliance being had upon *Sarah Way's Case*, 41 Mich. 301 (1 N. W.

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1021). *Second*, that, if it be contended that defendant was proceeded against as an alleged disorderly person, the conviction was void, for the reason that the complaint does not charge misconduct within the statutory or common-law meaning of the term "disorderly."

We may pass the first question with the remark that the complaint does not purport to charge vagrancy, and the prosecution makes no claim that the petitioner was convicted of vagrancy.

We have seen that the charter gives the authority to the council to provide by ordinance for the punishment of all persons who shall be disorderly on the streets or public places, and, under subdivision 34, "to punish disorderly persons of all kinds." Acting under these provisions, the ordinance in question was made. It provides that one chargeable with the conduct stated in the complaint shall be considered disorderly. Petitioner's counsel says that this was beyond the power of the council, for the reason that the common law did not make such act a crime, nor does our statute. In other words, the claim rests upon the proposition that the council may not make an offense of that which would not be so under existing rules of law.

There is no lack of authority to the effect that a council cannot, by ordinance, make an offense, when such action would be inconsistent with (*i. e.*, opposed to or in contravention of) a settled law or policy of the State, unless the authority is clearly conferred. 1 Dill. Mun. Corp. §§ 89, 319, 329. It is, however, equally certain that the condition of society in cities is such as to call for more stringent regulations than those usually provided for the State at large, and there are really but two questions here: (1) Whether, in granting the charter powers hereinbefore mentioned, the legislature used the term "disorderly" in the sense of its statutory or legal definition; and, if not, then (2) whether the ordinance is reasonable, and does not transgress the constitutional rights of personal liberty.

What is meant by the term "disorderly persons of all kinds?" We have a statute (2 Comp. Laws, § 5923) which

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enumerates many acts thereby made to constitute disorderly conduct, and the actors disorderly persons, subject to punishment under its provisions; and, while the punishment prescribed thereby is confined to the classes mentioned therein, it does not follow that no other acts are disorderly, or that the actors are not disorderly persons, in the ordinary sense of the term. This statute is not a limitation upon the legislature either to declare other acts disorderly, or to authorize municipal authorities to punish such acts within reasonable bounds, which is a common practice. The case of *City of Grand Rapids* v. *Williams*, 112 Mich. 247 (70 N. W. 547, 36 L. R. A. 137, 67 Am. St. Rep. 396), sustained such action under the charter in question, holding that one who peeks into the windows of the occupied house of another is punishable under this ordinance. This conviction is inconsistent with petitioner's contention. It is true that it is said in that case that the act is one punishable "as an immoral act," authorized by the first subdivision quoted from the charter, which permits the passing of ordinances "to prevent vice and immorality," and not under the power to punish "disorderly persons of all kinds," found in another subdivision; but we have no statute that makes such an act disorderly, or even punishable, any more than we have in the present case. It was said that this was an immoral act; but the ordinance explicitly declared that all persons guilty of immoral conduct should be considered disorderly persons. This ordinance, like the statute, does not attempt to punish all disorderly persons, but only such as it designates, and it calls such as violate its provisions disorderly persons. We think it clear that, when the charter mentions "disorderly persons of all kinds," it shows a legislative intent to do more than to permit the city to provide for the punishment of those already liable under the provisions of the general law. Interpreting this language in its ordinary sense, under the statute (1 Comp. Laws, § 50), makes the provision effective, while to follow the suggestion of petitioner's counsel would be to emasculate it and

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make it comparatively worthless. Again, it is significant that, while subdivision 20 of the charter confers the power to punish disorderly persons, thereby clearly covering all persons coming within the statute and common law, subdivision 34 emphasizes the power, and enlarges upon the term used in subdivision 20, by including all *kinds* of disorderly persons.

Counsel has cited some of our own cases, which he relies upon as supporting his contention, and these should be considered.

The *Case of Sarah Way*, 41 Mich. 301 (1 N. W. 1021), arose under a city ordinance. This was a charge of vagrancy. It was held that, under the charter of Detroit, vagrancy meant such cases of vagabondage as come fairly within the common-law meaning of the word, and the opinion states that "vagrancy is distinguished expressly from disorderly conduct generally" by the charter, Act No. 136, Laws 1861, chap. 13, § 12. This language serves the double purpose of explaining why the term "vagrancy" was held to be restricted in that case, and of showing that vagrancy may ordinarily be considered disorderly conduct, but not where a contrary intent is manifest. We may reasonably infer that but for this the result might have been different in the *Sarah Way Case*, and that she might otherwise have been punishable as a disorderly.

The *Case of Sarah Jones Jordan*, 90 Mich. 3 (50 N. W. 1087), did not arise under an ordinance. She was charged with being a disorderly person for reasons given. It was held that the case alleged did not come within the definition of the existing statute.

In our opinion, neither of these cases militates against the validity of this ordinance or charge, unless we are to say that the provision of this ordinance is an unreasonable or unwarranted abridgment of liberty. The following are distinctively cases of that kind: *In re Frazee*, 63 Mich. 401 (30 N. W. 72, 6 Am. St. Rep. 310); *City of Grand Rapids* v. *Newton*, 111 Mich. 48 (69 N. W. 84, 35 L. R. A. 226, 66 Am. St. Rep. 387).

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The case of *Pinkerton* v. *Verberg*, 78 Mich. 573 (44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473), does not involve the validity of an ordinance, but rather the legality of the act of the officer in assuming it to have been violated.

But it is not certain that this man was not a disorderly person, punishable at common law. For two weeks he loitered about the streets and barrooms, in idleness, without apparent habitation, and *without any means of support*, according to the charge. Yet he lived, and the inference is not unreasonable that he was supported in idleness by others in some way. He loitered about barrooms (*i. e.*, tippling places), and gave no satisfactory explanation of his conduct. Blackstone says (4 Bl. Com. 169) that all *idle persons* are punishable; while the statute 17 Geo. II, chap. 5, provided that idlers and disorderly persons, rogues and vagabonds, and incorrigible rogues should be punishable,—idlers and disorderly persons by a month's imprisonment, and the other classes by more severe penalties. And, if it be said that this statute is no part of our common law, idle persons were punishable under ancient statutes, which in their turn merely declared the common law in that respect. See 4 Bl. Com. 169. The uniformity of the practice of authorizing and passing and enforcing ordinances for the punishment of mendicants, idlers, and vagabonds is a circumstance that indicates the general recognition that such persons may be treated as lawbreakers, and punished in accordance with the general law of the land.

But little need be said on the other branch of the case, for the foregoing discussion shows that it is not an invasion of constitutional right to punish conduct in fact disorderly, and dangerous to and destructive of good order.

It does not follow that this ordinance would justify the conviction of all arrested under it, or that each of its provisions, standing by itself, would constitute an offense. We do not say that they would or would not. In this case, however, we are satisfied that the acts charged, and

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of which the petitioner was convicted, constitute an offense under this ordinance, and the petition will be dismissed, and the petitioner remanded to the custody of the respondent.

The other Justices concurred.

FRINK *v.* HUGHES.

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1. DEEDS—BUILDING RESTRICTIONS—DWELLING HOUSE.
A provision in a deed that nothing but a dwelling house shall be built on the premises conveyed excludes the erection of a photograph gallery.

2. SAME—INJUNCTION.
Such a provision, contained in a deed given by the proprietor of a plat, is enforceable in equity at the suit of another grantee from the same grantor, although other lots in the plat have been conveyed free from such restriction; it appearing that the owners of the latter have thus far observed the restriction, so that there has been no departure from the general scheme.

3. SAME—DECREE—MODIFICATION.
In such case, a provision in the injunctive decree, giving defendant the right to apply for a modification as the conditions may change, sufficiently protects his rights.

Appeal from Wayne; Rohnert, J. Submitted October 15, 1902. (Docket No. 66.) Decided April 28, 1903.

Bill by John H. Frink and Annie Z. Frink against J. Wesley Hughes to enjoin the violation of a building restriction in a deed. From a decree for complainants, defendant appeals. Affirmed.

T. T. Leete, Jr., for complainants.

Buell, Culver & Shepherd (*Frank E. Robson*, of counsel), for defendant.

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MONTGOMERY, J. Joseph R. McLaughlin, Bela Hubbard, and John E. King platted a portion of lots 4 and 5 of quarter section 44, Ten Thousand Acre tract, of Wayne county. The property is bounded by Woodward avenue upon the west, Holbrook avenue upon the north, Alger avenue upon the south, and is crossed by John R. street and Brush street, running north and south. King avenue runs easterly from Woodward avenue through substantially the center of the plat. The complainants purchased lot 40 of this subdivision by contract in 1896, which was afterwards fulfilled by deed, which contained a provision that nothing but a two-story dwelling house and the necessary outbuildings should be erected upon this lot, and that such dwelling house should be set not less than 20 feet from the front line of the lot. The defendant, Hughes, is the owner of lots 37 and 38. His title deeds contain a restriction providing that nothing but a two-story dwelling house costing not less than $3,000, set on a brick or stone foundation, shall be erected on the lots, and that the dwelling house shall be set not less than 20 feet from the front line of the lots,—a provision very similar in terms to that contained in complainants' deed. There is one intervening lot,—lot 39,—which is subject to similar restrictions. Lot 36, to the east of defendant's lots, also is held under similar restrictions. The evidence shows that portions of this plat were conveyed by deeds not containing restrictive clauses such as those inserted in the deeds of the present parties, but it is fairly to be inferred that the general plan of confining the use of the property to residential purposes was understood by all purchasers.

January 11, 1902, defendant, Hughes, commenced the erection on the southeast corner of lot 37 of a photograph gallery or studio. The defendant had been engaged in the business of commercial photography, consisting of making photographs for sale, and had his studio near the business center. The present building was started with the view of carrying on that business therein. The circuit judge decreed that the defendant be restrained from fur-

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ther proceeding to construct the building in question, and that he be restrained from carrying on the business, but provided that, on application of either party, this decree might be modified when, in the opinion of the court, circumstances and conditions had so changed that equity and justice should require such modification. From this decree defendant appeals.

In the case of *Watrous* v. *Allen*, 57 Mich. 362 (24 N. W. 104, 58 Am. Rep. 363), this court laid down the rule that a deed containing restrictive clauses such as that here considered could be enforced. In *Whitney* v. *Railway Co.*, 11 Gray, 359 (71 Am. Dec. 715), it was said of such provisions:

"The purpose of inserting them in the deed is manifest. It was to prevent such a use of the premises by the grantee and those claiming under him as might diminish the value of the residue of the land belonging to the grantor, or impair its eligibility as sites for private residences. * * * Nor can there be any doubt that, in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity."

It is also conceded that such provisions inure to the benefit of the grantee of the original grantor. But it is contended in the present case, first, that the structure in question does not come within the restriction. We think it very clear that this building is not such a building as is contemplated by the clause in question, and is clearly not a dwelling house, and falls within the restrictive clause of the deed. It is contended, also, that the complainants have been guilty of such laches as bars them from the right to bring this action. We do not so find the fact.

The principal question discussed on the argument, and the one which has given us the greatest difficulty, is as to

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the effect of the fact that McLaughlin and his associates granted title to some of the lots on this plat and in the neighborhood of the lot in question by title deeds not containing restrictive clauses. The defendant contends that these restrictive clauses are only available because the original plan was a plan to exclude everything but residences from these lots, and that, as the grantors have made title to lots without inserting these restrictive provisions, the scheme has failed, and that purchasers have the right to disregard their covenants. If this be true, it must be because equity relieves the defendant from the performance of a plain duty which he assumed at the time of accepting this grant. Why should equity grant such relief from this contract? The complainants stand bound by their contract equally with the defendant, and bought in view of the purpose of excluding everything but residences on this property. It would certainly be inequitable to bar them of a right of enforcing this agreement on the part of the defendant by any act of his grantor, and, unless the defendant has some superior equity to be relieved of his contract, the court should hesitate to relieve him.

In a class of cases we have held that, where the grantor has subsequently made grants to others without restriction, and under such grants the purposes of the original restriction have been frustrated as a matter of fact at the time the bill is filed, no relief will be granted. This question has been raised in this State in construing provisions restricting parties from selling intoxicating liquor on premises. *Chippewa Lumber Co.* v. *Tremper*, 75 Mich. 36 (42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420); *Jenks* v. *Pawlowski*, 98 Mich. 110 (56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522). In both these cases not only had there been a subsequent grant without restriction, but the grantees had engaged in the sale of intoxicating liquors, so that the purpose of excluding that business from the community was frustrated. Such is not the case here, however. Although some of these lands have passed out of the original grantor by conveyances not containing

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the restrictive clause, yet they have passed into the hands of parties who have thus far observed the original purpose. There has been in fact no substantial departure from the original scheme as to the entire plat. The defendant has not, therefore, had his property subjected to any diminution in value because of the departure from such scheme. More than this, as to such restrictions as are contained in this deed, it does not necessarily follow that, because the restrictive covenant is not inserted in deeds of *all* the property on this entire plat, therefore this restrictive clause is of no effect. As was said in *Clark* v. *Martin*, 49 Pa. St. 298, in referring to such a question as this:

"It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots, and this element actually exists in about half of the cases just cited; yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan."

We find it unnecessary to determine whether, if the failure of restriction had in fact resulted in the building up of business blocks on other portions of King avenue, this would have relieved the defendant of his obligation. We think the decree of the court below has sufficiently protected the defendant when, by its terms, it has left it open to him to bring to the attention of the court any changed conditions in the property which may take place at a later day.

The decree will be affirmed, with costs.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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NEW ERA ASSOCIATION *v.* MACTAVISH.

1. LIFE INSURANCE—STIPULATIONS—CONSTRUCTION—EVIDENCE.
   A stipulation in an application for a life policy that, if the applicant's statements were untrue in any particular that would have led to his rejection if correctly stated, the policy should be void, is for the construction of the court, and the company's officers cannot be permitted to testify that the application would have been rejected if certain facts had been truthfully stated therein.

2. SAME—MATERIAL MISREPRESENTATIONS.
   Under the stipulation, it would require a material misrepresentation to avoid the policy.

3. SAME—EXPERT TESTIMONY.
   It is not competent for the medical director and secretary of a life-insurance company to testify that, in their opinion, the facts misstated in an application for a policy were material to the risk.

4. SAME—FAMILY HISTORY.
   An applicant for insurance stated in his application that the cause of a sister's death was kidney inflammation, whereas it in fact was chronic pneumonia. *Held*, not *prima facie* a material misrepresentation.

5. SAME—EVIDENCE—PRESUMPTIONS.
   Where, in a suit to cancel a life policy, there was testimony tending to show that insured would have been an acceptable risk in ordinary companies, notwithstanding a sister had consumption (he being over 40 years of age, and not living in her family), it could not be presumed that a statement by insured in his application that his sister enjoyed good health was a material misrepresentation.

Appeal from Kent; Perkins, J. Submitted November 19, 1902. (Docket No. 109.) Decided April 28, 1903.

Bill by the New Era Association against Maggie Mactavish to set aside a contract of life insurance and enjoin an action for its collection. From a decree for defendant, complainant appeals. Affirmed.

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Knappen, Kleinhans & Knappen, for complainant.

Lee E. Joslyn, for defendant.

CARPENTER, J. January 6, 1898, complainant insured the life of Duncan A. Mactavish. Defendant was the wife of said Mactavish, and the beneficiary in said contract of insurance. In June, 1898, it was discovered that said Mactavish had tuberculosis, and he died from this disease on the 17th of the following November.

At the time he was insured, Duncan A. Mactavish was a physician in active practice in West Bay City. He was one month less than 43 years of age, 5 feet 10½ inches in height, and weighed 178 pounds. He had never been attended by a physician, nor apparently been unable to attend to his active work. His weight had, however, diminished about 10 pounds during the preceding year, and about 40 pounds during the preceding six or seven years. To procure this insurance, Dr. Mactavish made an application in which, among other things, he stated that he was in good health and of sound body, that the health of his living sisters was good, and that the cause of the death of a deceased sister was kidney inflammation.

After the death of Dr. Mactavish, defendant commenced a suit at law in the circuit court for the county of Bay to recover on said contract of insurance. Thereupon complainant commenced this suit in the circuit court for the county of Kent, in chancery, to set aside the contract of insurance on the ground that it was procured by fraud, and obtained an injunction restraining the prosecution of said suit at law. Complainant's right to resort to chancery for relief, and to enjoin the pending suit at law, was determined by this court in *Mactavish* v. *Kent Circuit Judge*, 122 Mich. 242 (80 N. W. 1086). The hearing in the lower court resulted in a dismissal of the bill of complaint, and a decree in favor of defendant on her answer in the nature of a cross-bill for the amount stipulated in the insurance contract. From that decree complainant

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appeals. It contends that the insured obtained the contract of insurance by fraud, in these particulars:

1. Instead of being in good health and sound body, as represented, he was afflicted with diabetes and tuberculosis.

2. Instead of having good health, as represented, his sister Jane McIlvenna was afflicted with tuberculosis.

3. Instead of dying from kidney inflammation, as represented, his sister Kate Manson died from chronic pneumonia.

We will examine each of these questions separately.

1. Did the insured have diabetes and consumption on January 6, 1898, when he represented his health to be good and his body to be sound? There is testimony tending to prove complainant's contention. On the other hand, there is more convincing testimony to the contrary. We are convinced that he did not have diabetes January 6, 1898, and that he subsequently contracted the tuberculosis which occasioned his death the following November. To discuss this testimony in detail, and to give reasons for our conclusion, would serve no useful purpose.

2. We can discuss the second and third claims of fraud together. While we do not think the testimony warrants the claim that Dr. Mactavish acted in bad faith in representing the condition of the health of one sister or the cause of the death of another, it does warrant the claim that the representations were in fact untrue. Assuming, without deciding, that Dr. Mactavish was responsible for unintentional false statements, the question arises whether such false statements avoid the policy.

Dr. Mactavish agreed "that, if these statements are untrue in any particular which would have led to my rejection had it been stated in accordance with the facts, whether intentionally or otherwise, then this contract shall be null and void." The only evidence that Dr. Mactavish would have been rejected, had he correctly stated the condition of Mrs. McIlvenna's health and the true cause of Mrs. Manson's death, is the testimony of Dr. Ruffe, complainant's medical director, and Dr. Webster, its secretary, to the

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bald proposition that, if these facts had been truthfully stated, the contract in question would not have been made. This testimony was taken subject to defendant's objection that the same was incompetent and irrelevant.

We think this objection must be sustained and the testimony disregarded. There is no pretense that Dr. Mactavish knew, or had any reason to know, the practice of complainant's officers. If the construction of this language depends on the practice of the insurance company which uses it, then it follows that, if used by two or more companies, it will have a different meaning if the companies differ in their methods. To adopt the theory of complainant is to permit one of the parties to a contract to determine its construction. "The insurer cannot be permitted to testify that he would not have taken the risk had he known the facts." 2 May, Ins. § 580. The language under consideration must be construed by the court. In our judgment, it is susceptible of but one construction: Any material misrepresentation avoids the contract.

Were the misstatements under consideration material? It is assumed in the briefs that the testimony of Drs. Ruffe and Webster, above referred to, may be regarded as their opinion that these misstatements were material; and an attempt to justify their testimony is made by citation of authorities holding it competent for an expert witness to state his opinion of what is material. The authorities touching this question are most carefully collected and analyzed by Judge Taft in *Penn. Mut. Life-Ins. Co.* v. *Mechanics' Sav. Bank*, 19 C. C. A. 286, 72 Fed. 413, 38 L. R. A. 33. We agree with his conclusion: "The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk;" and that "the proper form in which the question might have been put to a duly qualified witness was, 'Are you able to say, from your knowledge of the practice and usage among life-insurance companies generally, that information of this fact would have

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enhanced the premium, or would have led to a rejection of the risk?'" Tested by this principle, there was no evidence tending to prove the misrepresentations under consideration material. Without such evidence, we cannot, under the authorities, find that the misrepresentation of the cause of Mrs. Manson's death was material. The chronic pneumonia of which she died furnished no evidence of hereditary disease. The defendant introduced testimony tending to prove that Dr. Mactavish—being over 40 years of age, and not living in her family—would have been an acceptable risk, according to the rules and practice of ordinary insurance companies, notwithstanding the fact that his sister Mrs. McIlvenna had consumption. We are referred to no authority which authorizes us to disregard this testimony, and assume of our own knowledge that this misrepresentation was material. We do not believe that we can make any such assumption. We are bound, therefore, to decide that the misrepresentation of the condition of Mrs. McIlvenna's health was immaterial, and did not avoid the contract.

It results from this reasoning that the decree of the court below must be affirmed, with costs.

MOORE, GRANT, and MONTGOMERY, JJ., concurred with CARPENTER, J.

HOOKER, C. J. (*dissenting*). I am unable to avoid the conviction that the preponderance of the evidence in this cause establishes the fact that the insured was suffering from an incurable disease when his application for membership was made. I am of the opinion, therefore, that the complainant is entitled to a decree.

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CRANE v. WALDRON.[1]

1. CONSTITUTIONAL LAW — RULES OF EVIDENCE — FRAUDULENT CONVEYANCES—BILLS IN AID OF EXECUTION—PRIMA FACIE CASE —DUE PROCESS OF LAW.

   Act No. 99, Pub. Acts 1897 (3 Comp. Laws, § 10203), providing that, in suits in aid of execution, complainant shall make a *prima facie* case by introducing in evidence the judgment against the principal defendant, the execution, with levy thereon indorsed, and proof of the conveyance complained of, prescribes a mere rule of evidence, and is not violative of the constitutional guaranty of "due process of law." GRANT and MOORE, JJ., dissenting.

2. SAME—TITLE TO STATUTE—SUFFICIENCY.

   The object of the act is sufficiently indicated by its title, viz., "An act to provide for the change of rules of evidence in cases where bills in aid of execution are filed."

3. SAME—LOSS OF EXECUTION—SECONDARY EVIDENCE.

   The fact that the execution in a given case is lost does not exclude the application of the statute, but parol evidence of its contents may be given.

4. SAME—APPEAL—OBJECTIONS.

   A contention that the contents of a lost execution were not sufficiently proved will not be sustained on appeal, where there was proof of a valid judgment, and the issue and levy of an execution thereunder, and the only objection to the testimony was that it was "incompetent and immaterial."

Appeal from Eaton; Smith, J. Submitted January 9, 1902. (Docket No. 43.) Reargued January 14, 1903. Decided April 28, 1903.

Bill by William Crane against John Waldron and Mary Ann Waldron in aid of execution. From a decree for complainant, defendants appeal. Affirmed.

S. B. Roe and *Richard Rudabaugh*, for complainant.

Thomas, Cummins & Nichols, for defendants.

[1] Rehearing denied September 22, 1903.

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HOOKER, C. J. On July 12, 1900, complainant obtained a judgment against John Waldron in a justice's court in Shiawassee county for about $170. On July 21, 1900, a transcript was filed, and an execution was issued by the circuit court to the sheriff of Eaton county, and on July 23, 1900, it was levied upon some village lots in that county, the title to which was formerly in John Waldron. On June 26, 1900, John Waldron, who then lived in Shiawassee county, deeded the same to his daughter, Mary Ann Waldron, who for several years had been working out in the capacity of domestic. On December 10, 1900, this bill was filed in aid of the execution, to which the defendants answered separately, denying that the transfer was fraudulent, and asserting that it was in payment of $250, of which $200 had been earned by Mary, and loaned to or expended for the benefit of John, Waldron, previous to the transfer. Upon the hearing, complainant made proof of the judgment, the issue of execution, the levy, and the deed. The execution itself was not produced, but was shown to be lost, and secondary evidence was admitted. The defendants offered no testimony. A decree was rendered in behalf of complainant, and the defendants have appealed.

Counsel for defendants attack the constitutionality of Act No. 99, Pub. Acts 1897, being 3 Comp. Laws, § 10203, which provides that, "in all suits in aid of execution, the complainant shall make a *prima facie* case by introducing in evidence the judgment against the principal defendant, the execution with the levy or levies thereon indorsed, and proof of the conveyance complained of." They also question the sufficiency of complainant's evidence. They say that:

"Bills in aid of execution only lie where the conveyance was made with the intent to hinder, delay, or defraud creditors. Section 9533, 3 Comp. Laws. If the grantee is a purchaser for a valuable consideration, then it must further appear that he had notice of his grantor's fraudulent intent. Section 9537, Id. To establish a *prima facie*

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case, therefore, it must appear: *First*, that the conveyance was made with the intent to defraud creditors; *second*, that the purchaser gave no consideration, or else took with notice of his grantor's fraudulent intent. The statute of 1897 attempts to make the judgment, execution, or deed, without the aid of other proof, evidence of fraudulent intent on the part of the grantor, and evidence of notice of such fraudulent intent on the part of the grantee."

Their claim is that "due process of law" requires that some evidence be given of a fraudulent intent by Waldron, shared by his daughter.

The power of the legislature to prescribe rules of evidence is undoubted. When one is in debt, and deeds all of his property subject to execution to another, who has no visible property, it cannot be said that there is no evidence tending to show fraud. It was within the legislative power to say that these facts shall be *prima facie* evidence of a fraudulent intent, making it necessary for the persons charged with fraud to give some testimony to the contrary. Cooley, Const. Lim. (6th Ed.) 450; *Gruner* v. *Brooks*, 126 Mich. 465 (85 N. W. 1085); *Molitor* v. *Robinson*, 40 Mich. 200; *Buhl Iron Works* v. *Teuton*, 67 Mich. 623 (35 N. W. 804); *Hatch* v. *Fowler*, 28 Mich. 205; *Webster* v. *Bailey*, 40 Mich. 641; *Cooper* v. *Brock*, 41 Mich. 488 (2 N. W. 660); *Kipp* v. *Lamoreaux*, 81 Mich. 299 (45 N. W. 1002); *U. S.* v. *Lee Huen*, 118 Fed. 442.

The title to the act is "An act to provide for the change of rules of evidence in cases where bills in aid of execution are filed." This is sufficient, unless we are to say that the title must be an index of the provisions of the act, which is not required.

It is contended that the failure to produce the execution at the trial was an omission which excludes the application of the statute. We are of the opinion that secondary evidence is admissible, under this statute, in accordance with the general rule.

A number of technical reasons are urged in support of the proposition that the contents of the execution were not

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proved. The testimony regarding the execution was not challenged, except under the very general objection that the proof was incompetent and immaterial. We discover nothing that should have indicated to the court that objection was made that it was not shown to be properly directed, or properly tested, or issued in the name of the people, etc., or that it was not returnable reasonably, or did not properly recite the judgment or name the parties. Under the circumstances, the statement by Cooper that he received an execution in the *case stated* from Shiawassee county, the admission of the validity of the judgment upon which it was issued, the copy of the transcript of judgment, and the notice duly filed, are sufficient to convince the mind, in the absence not only of evidence, but of any claim, to the contrary.

The decree is affirmed, with costs.

CARPENTER and MONTGOMERY, JJ., concurred with HOOKER, C. J.

GRANT, J. (*dissenting*). The bill in this case was filed in aid of an execution upon a judgment for $167.83, exclusive of costs, rendered July 12, 1900, by a justice of the peace. A transcript was duly taken to the circuit court, execution issued, and levy made. The bill, after setting forth the facts, alleges a deed, made on June 27 (it was in fact made June 26), 1900, by the defendant John and his wife to the defendant Mary, his daughter, and that said deed was made without consideration, and was fraudulent and void. The answers deny all the material allegations of the bill as to the transfer of the property; allege a *bona fide* consideration; that Mary worked out as a domestic, and gave the greater portion of the money she earned to her father, upon the promise that her father should convey the lands to her for her own use. Complainant made his case by proving his judgment, execution, levy, the deed from defendant John to his daughter, Mary, and that the land was worth about $400. Defend-

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ants introduced no evidence, and a decree was rendered for the complainant.

The sole evidence of fraud upon which the decree in this case is based is the deed made by defendant John to his daughter, Mary, and the fact that he was at the time in debt. The bare execution of a deed and the fact of indebtedness by the grantor are, therefore, made to establish a fraud, for which alone the deed could be set aside. Complainant relies upon Act No. 99, Pub. Acts 1897, the title and body to which read as follows:

"An act to provide for the change of rules of evidence in cases where bills in aid of execution are filed.

"SECTION 1. That in all suits begun or hereafter to be begun by the filing of bills in aid of execution, the complainant shall make a *prima facie* case by introducing in evidence the judgment against the principal defendant, the execution with the levy or levies thereon indorsed, and proof of the conveyance or conveyances complained of. The burden of proof shall then be upon the judgment debtor, or the person or persons claiming through or under him, or the person or persons whom it is claimed are holding property in trust for said judgment debtor, to show that the transaction or transactions are in all respects *bona fide*, or that such person or persons are not holding as a trustee or trustees of said judgment debtor."

This legislation is unique. It stands alone. It has no precedent or posterity. No such law is found upon the statute books of any other State. We cannot, therefore, have the benefit of the reasoning and conclusions of other courts in determining the constitutionality of the act. We must determine it upon reason and principle. For centuries the usual method of transfer of title to land has been by deed. Thousands of them are executed every day. No other method of obtaining title, except upon execution, decree, or by adverse possession, is known to the law. Presumptively these transfers are honest. Ever since civilization began they always have been, and still are, so considered. Like all other business transactions, they are daily executed, delivered, and received in good

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faith. Without this presumption, business could not well be carried on. The law does not limit its effect to cases between members of the same family, which courts of law as well as of equity scan with great care, where lands are transferred by one who is in debt. The earmarks of fraud in such cases are easily traceable, and courts have found no difficulty in dealing with them under the rules of evidence which have always existed. But the law stamps as presumptively fraudulent every deed made by every person against whom is a judgment unpaid, and that, too, whether the debt was contracted before or after the deed was made. Most business men are borrowers of money. Merchants borrow money at the banks in order to meet their current indebtedness, and buy goods upon credit. Many borrow money with which to make investments. If the legislature, under the specious plea of the mere change in the rules of evidence, can make the execution of a deed presumptive fraud, it can also make the execution of every other contract a presumptive fraud, no matter whether it exists in writing or in parol. Contracts of sale of real and personal property, bills of sale, promissory notes, in fact every act or transfer of property essential to the business life of the country, can be made by the legislature a presumptive fraud upon simply proving that, at the time of the transfer or execution of the paper, the maker or vendor was in debt for any sum, however trivial.

The statute under which this suit was brought to set aside the deed makes every such conveyance "made with the intent to hinder, delay, or defraud creditors" void. Section 9533, 3 Comp. Laws. That act further provides that the question of fraudulent intent in all cases arising under it shall be deemed a question of fact, and not of law. Section 9536, Id. Now, the legislature, by Act No. 99, Pub. Acts 1897, has provided that one of the ordinary business transactions of life—an act essential to the maintenance of business—is presumptively a fraud, and shall stamp every party thereto as guilty of a fraud, for which the debtor and grantor might be imprisoned under

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the fraudulent debtor's act. Section 9556, Id. That law provides that a debtor may be arrested and imprisoned upon proof that he has assigned, removed, or disposed of his property with intent to defraud his creditors. It follows that the legislature, if this law be sustained, can provide that the execution of any paper by a debtor is sufficient proof of his fraud to confine him in prison. The validity of this law cannot be determined upon the theory that it includes only transfers between members of the same family. Many of such transfers, however, are entirely valid, as this court and others have held (in fact, the great majority of them are); others are invalid, as the courts have frequently held. But it never before entered the mind of man to conceive that transactions presumptively honest, and which, in at least 99 cases out of 100, are honest, shall be presumptively dishonest and fraudulent.

Let us look further at the result of this law. The grantor and grantee may both be dead when the suit is tried. All evidence of the transaction, except the bare fact of the execution of the deed, is buried with the dead. Both parties may be stamped, under this act, as guilty of fraud, by simply proving that the grantor, at the time of the transfer, was in debt. The grantee may have paid full consideration, and yet his family be deprived of their property, and left in poverty, with their father and husband disgraced by the decree of the court, and that upon the bare proof that the grantor of their husband and father was in debt at the time he executed the deed.

Does this law simply change a rule of evidence? In my judgment, it does not. It deliberately attempts to make a presumptively honest act a presumptive fraud. It deals with facts, not with evidence. It does not take up some rule of evidence and change it. The execution of a deed, though the grantor be in debt, is not of itself evidence of fraud. There always have been, and always ought to be, some other facts connected with it which tend to show a fraudulent intent. Evidence is defined to be any matter

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of fact the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. Best, Ev. § 11. It is a logical and reasonable rule that, in order to be evidence, the facts presented must tend to prove the fact in issue. The fact in issue in this case is fraud on the part of two persons, the grantor and the grantee of a deed. Do the execution of a deed and the indebtedness of the grantor prove or tend to prove the two essential facts that both were guilty of intent to defraud the creditors of the grantor, and that no consideration was paid? Would not such a holding be repugnant to reason and common sense?

The right of the legislature, within certain limitations, to prescribe rules of evidence, is conceded. *People* v. *Cannon*, 139 N. Y. 32 (34 N. E. 759, 36 Am. St. Rep. 668); *Board of Com'rs* v. *Merchant*, 103 N. Y. 143 (8 N. E. 484); *State* v. *Beswick*, 13 R. I. 211 (43 Am. Rep. 26); *Meadowcroft* v. *People*, 163 Ill. 56 (45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447). What these limitations are there may be some difficulty in determining. Courts have recognized this.

In *Board of Com'rs* v. *Merchant* it is said: "While the power has its constitutional limitations, it is not easy to define precisely what they are." The same opinion says: "It would not be possible to uphold a law * * * which made that *prima facie* evidence of crime which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act." The same rule must apply in civil cases where fraud or crime is the real issue. The law the constitutionality of which was questioned in that case made the drinking of intoxicating liquor on the premises *prima facie* evidence that it was sold with intent to be drunk on the premises.

The rule is concisely and well stated in *People* v. *Cannon*:

"The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact."

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In *Com.* v. *Williams*, 6 Gray, 1, the law made delivery of intoxicating liquors in or from any building or place other than a dwelling house *prima facie* evidence of a sale. The act was sustained upon the theory that delivery is essential to, and is some evidence of, every sale of property. Justice Thomas filed a very able dissenting opinion, maintaining that an act in itself innocent cannot be made by the legislature presumptive evidence of guilt.

In *State* v. *Beswick*, *supra*, a law which made the notorious character of the premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grogshops, tippling shops, or places where such liquors are sold, *prima facie* evidence that such liquors were kept on such premises for sale, was held unconstitutional and void. Whether that holding is in accord with the weight of authority we need not determine. The following language is so clearly in point that I quote it:

"Indeed, to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defense left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf, having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie embedded in the phrase 'the law of the land,'"—citing authorities.

In *State* v. *Buck*, 120 Mo. 479, 495 (25 S. W. 573), a law providing that the failure of a bank should be *prima*

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facie evidence that the officer received deposits knowing the bank to be insolvent was sustained. The decision, however, left the law ineffective, because it held that the burden of proof was not really changed, and that the *prima facie* case did not warrant a conviction. But under this act the courts are compelled to render a decree for complainant upon bare proof of judgment and levy. The court in *State* v. *Buck* likened that case to the rule of the common law that an assault upon another with a deadly weapon, at some vital part, presumes an intent to kill, and that the possession of stolen property recently after its theft raises the presumption that the possessor was the thief.

In *Meadowcroft* v. *People*, *supra*, the law provided that a banker receiving deposits when insolvent is presumptively guilty of a fraud in so receiving them. The law was sustained upon the theory that:

"He [the banker] holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted. It is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency."

A similar case is *State* v. *Beach*, 147 Ind. 74 (46 N. E. 145, 36 L. R. A. 179).

How would lawyers, or laymen, even, look upon a decision of a court or an act of the legislature making every person who purchased from an insolvent banker a promissory note, or mortgage, or land, presumptively guilty of fraud?

It is worthy of note that most, if not all, of such decisions to which our attention has been called, hold that the acts of the legislature did not change the burden of proof. It is also significant that the acts involved in those cases make only those facts *prima facie* evidence which are so closely allied to the offense charged that they are of themselves some evidence of the intent required to constitute the offense, or some evidence of the main fact in issue.

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They all are aimed at persons while living, and do not attempt to make their acts *prima facie* evidence of fraud against their grantees, vendees, heirs, and devisees. The circumstances surrounding the transactions which, by the acts in those cases, were made *prima facie* evidence, are so indicative of wrong, and so exclusively within the knowledge of the party charged, that courts have held it not unreasonable to call upon him for explanation. This is the basis upon which those decisions rest, and, in my judgment, is the only basis upon which they can rest.

How can such a doctrine be applied to the daily business transactions of life, and to the daily transfers of property, which are always, and of necessity must be, *prima facie* honest and valid? It is neither dishonest, nor evidence of a fraud or intent to commit a fraud, to be in debt. It is not dishonest, neither is it evidence of dishonesty or fraud, to buy or sell property, real or personal, when one is in debt. If it were, probably a majority of the sales and transfers of property, both real and personal, would be presumptively fraudulent. It would, in my judgment, be monstrous to hold that a transfer of property by a debtor is presumptively a fraud. Debtors often sell property for the purpose of paying certain of their debts, and the law has always justified them in so doing. It would be more monstrous to hold that his grantee is presumptively a participant in the fraud. By what process of reasoning can it be held that a sale and transfer of property by one who is in debt is any evidence of an intent to defraud? If a statute should provide that, in a suit against an alleged forger to recover money paid on an alleged forged note, the production of the note and proof that the alleged maker did not execute it should make a *prima facie* case against the defendant, could such an act be sustained upon the pretense of the right of the legislature to change the rules of evidence? There is, in my judgment, no relation between the fact of indebtedness and the intent to commit a fraud or to defraud the debtor's creditors. The former has no tendency to prove the latter,

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especially on the part of a grantee or vendee, the sole party in interest in the suit. For this reason I think the act is void.

Counsel for the complainant seek to sustain this law upon the theory, "if the right is not expressly prohibited, or prohibited by implication, by the State Constitution, the legislature has not exceeded its power, and the statute is constitutional;" citing *Sears* v. *Cottrell*, 5 Mich. 251. As applied to the facts of that case, the rule there stated is not disputed. There are, however, some things the legislature cannot do, although not prohibited by the Constitution, and the lawbooks are replete with such cases. Some things are so repugnant to the principles of our government and to reason and common sense that the legislature cannot enact them into valid laws. The legislature cannot declare presumptively honest citizens to be presumptively dishonest, or the daily and presumptively honest transactions of life to be presumptively fraudulent transactions, under the thin guise of a change in the rules of evidence. Every citizen under our Constitution is entitled to the presumption of honesty in his daily transactions, and he who attacks his honesty is bound to prove his dishonesty and his fraud, before he can deprive him either of his liberty, his property, or his good name. The language of the Supreme Court of the United States, speaking through Justice Chase, in *Calder* v. *Bull*, 3 Dall. 387, is here appropriate:

"I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. * * * The nature and ends of legislative power will limit the exercise of it. * * * There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot

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call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

This language is quoted with approval in *City of Janesville* v. *Carpenter*, 77 Wis. 288 (46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123). That case involved a law of Wisconsin which reads as follows:

"It shall be unlawful and presumptively injurious and dangerous to persons and property to drive piles, build piers, cribs, or other structures, * * * in Rock river, within the limits of the county of Rock, and the doing of any such act shall be enjoined at the suit of any resident taxpayer without proof that any injury or danger has been or will be caused by reason of such act."

A bill was filed asking for an injunction under this statute, and the court below sustained it. The question arose upon a motion to dissolve the temporary injunction. The supreme court said:

"This statute is, if possible, more marvelous than the complaint. * * * The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous which is not and cannot be made to be so without a violation of the constitutional rights of the defendant, and imperatively commands the court to enjoin it without proof that any injury or danger has been or will be caused by it. It reverses very many decisions of this court on the very questions involved in it, and which have the effect of a judicial determination of the defendant's rights of property. It violates section 2 of article 7 of the State constitution, which provides that the judicial power of the State, both as to matters of law and equity, shall be vested in the various courts. It takes away the jurisdiction of the courts to inquire into the facts, and determine the necessity and propriety of granting or refusing an injunction in such a case according to the established rules of a court of equity. *Ervine's Appeal*, 16 Pa. St. 256 (55 Am. Dec. 499). It is said in that case:

"'That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to *despotic rule* than to any other attribute of government.'"

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So the legislature in this case adjudicates an act, in itself lawful, in itself no evidence of fraud, and in itself presumptively fair and honest, to be presumptively a fraud, and commands the court to enter a decree upon it. I think this a clear invasion by the legislative department of the authority conferred by the Constitution upon the judicial department.

In *Sears* v. *Cottrell*, 5 Mich. 251, 261, Justice CHRISTIANCY, in his majority opinion, said:

"I do not say, and I am not willing to say in advance, that an act of the legislature might not be so utterly subversive of all the purposes of justice, so oppressive in all its features and objects, and so repugnant to the fundamental principles of republican government, that it ought to be declared void on that account, though it might not conflict with any provision of the Constitution. See *Bowman* v. *Middleton*, 1 Bay, (S. C.) 252."

Mr. Ordronaux, in his recent work, says:

"But this express theoretic view of legislative power, which in England has led to the doctrine that an act of parliament cannot be questioned or its authority controlled in any court of justice, must, in the United States, be considered as meaning always power exercised within the constitution, and in accordance with the principles of our social compact. Hence no omnipotence attaches itself to the power of an American legislature, even where the constitution has imposed no explicit restraint, because in the exercise of that power it may have violated some fundamental maxim of a free government." Ord. Const. Leg. p. 346.

In the leading case of *People* v. *Township Board of Salem*, 20 Mich. 452 (4 Am. Rep. 400), the right of the legislature to authorize townships to vote money to aid in the construction of railroads was involved. It was held unconstitutional. There was no express provision of the Constitution against such legislation, and the three prevailing opinions did not mention any provision of the Constitution violated by the law. Justice COOLEY, at page 473, said:

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"It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words."

Chief Justice CAMPBELL, at page 495, said:

"There are purposes the illegality of which would be so manifest that, although not mentioned in any constitution, no one could hesitate to say the burden was not validly imposed to further them."

In the recent case of *Michigan Sugar Co.* v. *Auditor General*, 124 Mich. 674 (83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354), no express provision of the Constitution was pointed out which the sugar bounty act violated. Justice LONG, speaking for the entire court, said:

"The legislature is the mere creature of an organic law, deriving all its power from the Constitution. Its power within those limits must be admitted to be plenary, except so far as otherwise specifically limited; but outside those limits it is as powerless as if specifically prohibited."

Mr. Cooley, in his valuable treatise, says:

"It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. * * * The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government." Cooley, Const. Lim. *174.

See, also, *Hanson* v. *Vernon*, 27 Iowa, 28 (1 Am. Rep. 215); *State* v. *Mayor, etc., of Des Moines*, 103 Iowa, 76 (72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157).

Does this act secure to a party the benefit of due process of law, as guaranteed by the bill of rights in our Constitution and by that of the United States? These bills of right provide that no person shall be deprived of his life, liberty, or property contrary to "the law of the land," or

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without "due process of law." These two expressions have been construed to mean the same thing, and are those used in the bills of right of the various States. Courts and law writers have found difficulty in giving definitions to this language which shall be applicable to all cases. This is due to the diversity of cases. Cooley, Const. Lim. *353. I quote a few of these definitions: Chancellor Kent says: "It means law in its regular course of administration through courts of justice." 2 Kent, Com. 13. Mr. Webster, in the *Dartmouth College Case*, defines it thus:

"By the 'law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Justice COOLEY says that no definition embodies more tersely and accurately the correct view of the principle than is contained in the words of Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235:

"After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Mr. Cooley defines it thus:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley, Const. Lim. *356.

For other definitions, see Brannon on the Fourteenth Amendment, chap. 11.

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"A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law." *Board of Com'rs* v. *Merchant*, *supra*.

I quote with approval the language of Mr. Justice Thomas in a dissenting opinion in *Com.* v. *Williams*, *supra*:

"If the legislature may say an innocent act is presumptive evidence of guilt, it would be only one step further in the same direction to make that presumption conclusive. * * * Where the act proved is equally consistent with innocence or guilt, the presumption of innocence must stand. The plainest dictates of justice require it. The right of trial by jury includes it. A statute which takes from the accused the shield of that presumption essentially impairs that right."

Due process of law does not mean the subpœna or other writ by which a party is brought into court at the instance of a party plaintiff or complainant. If, after he has been brought in, he is at any stage of the proceeding deprived of the benefit of "the law of the land," the proceeding against him is void, and he has not had the benefit of due process of law.

This act, as already shown, does not require a plaintiff or complainant to produce evidence of any fact which in and of itself is evidence of fraudulent or criminal intent. It requires him to prove only certain facts which in and of themselves are entirely consistent with honesty, which always have been, and always must be, so considered. It brings defendant into court by process of subpœna, and then says to him: "Prove that the legal title to your property is good; that you bought it in good faith; that you paid a valuable consideration for it; that your grantor did not, in selling to you, commit a fraud, or, if he did, that you did not participate in it." If such grantee be dead, it says substantially the same thing to his widow and children, his heirs and devisees. If he has become insane, in which case it is impossible for him to testify, his property must be taken away from him without a

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particle of evidence to show any intent to participate in the fraud of another. If he be dead, his widow and children in many cases would be powerless to show the *bona fides* of the transaction, and not only must lose their property, but must have their husband and father decreed to have been guilty of a fraud, without one particle of evidence to show it. Is this due process of law? Is it due process of law to say to a man's widow and children, "Prove the good faith of your husband and father in obtaining title to this property, which may be your homestead, or it shall be taken away from you, and turned over to others?" "The right to private property is a sacred right." Cooley, Const. Lim. (6th Ed.) 436. Is not this sacred right frittered away when the legislature says to its citizen, "Your title is presumptively a fraud, because some grantor in the chain of title conveyed it when he was in debt; and, unless you can show that it was not a fraud, you must lose it, whether you are the original grantee or some subsequent grantee, or their heirs or devisees?"

Under this act the court has no discretion. It is not required to exercise any judgment. It must render a decree upon bare proof of judgment, levy of execution, and the deed, not only against the original vendee, whether sane or insane, but against his vendees, his widow and children, his heirs and his devisees, without proof of a single fact which, in the history of jurisprudence, has ever been held to be proof of fraud or a fraudulent purpose. In many cases years may have passed since the transaction. The property may have changed hands a dozen times. The grantee's heirs may have lived upon and improved the property, and under this act they must lose it, without proof of a single fact to indicate fraud or fraudulent intent. Does this law provide for a hearing or an inquiry, within the definition of Mr. Webster? Is it a trial, within his definition, where the legislature has prescribed that, upon acts in themselves innocent and honest, the court must render judgment? Is this "law in its regular course of administration," within the definition by

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Chancellor Kent? Is it within "the established principles of private rights and distributive justice," as defined by the United States Supreme Court? Is it within "the settled maxims of law, and such safeguards as those maxims prescribe," within the definition of Justice COOLEY? I think these questions must be answered in the negative. In my judgment, such an act does not provide for due process of law, and is therefore unconstitutional and void.

The decree should be reversed, and the case remanded for complainant to introduce further evidence, if he chooses to do so.

MOORE, J., concurred with GRANT, J.

SCANDINAVIAN SVEAS BENEVOLENT SOCIETY v. LINQUIST.

1. FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY.
   A decree setting aside a conveyance as in fraud of creditors was sustained, though based on independent facts constituting badges of fraud, rather than on proof of a deliberate plan to defraud.

2. SAME—CONSIDERATION—NOTICE.
   Knowledge on the part of a transferee of property of his grantor's intention to defraud creditors will invalidate the transaction, where the consideration consisted of part cash and part the discharge of an antecedent debt.

Appeal from Oceana; Russell, J. Submitted February 17, 1903. (Docket No. 81.) Decided April 28, 1903.

Bill by the Scandinavian Sveas Benevolent Society of Whitehall against Peter E. Linquist, Caroline Linquist, and Albert Linquist in aid of execution. From a decree for complainant, defendants appeal. Affirmed.

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C. W. Sessions (*W. E. Osmun*, of counsel), for complainant.

Ed. J. Smith (*W. J. Turner*, of counsel), for defendants.

MONTGOMERY, J. The bill in this case is filed in aid of an execution and to set aside a conveyance of 80 acres of land in Oceana county, valued at $600 to $800, made by defendant Peter E. Linquist to his son, Albert, at a time when a suit at law was pending and about to be tried, in which the present complainant was plaintiff and the defendant Peter was defendant. Upon a hearing on pleadings and proofs, the circuit judge declared the transaction fraudulent, and defendants appeal.

The defendants' counsel strenuously insist that the circuit court based the decree on mere suspicion, and that there was no adequate proof of fraud. This contention has challenged careful scrutiny of the testimony in the case, which has led us to the conclusion that the circuit judge's finding not only does not rest upon suspicion merely, but is well supported by the testimony in the case. True, no one testifies to a deliberate plan to defraud, and the complainant's case is made out by independent facts constituting badges of fraud. It would not aid in future cases to enumerate these. The question is one of fact, and we have no hesitancy in holding that the circuit judge reached the correct conclusion. We are satisfied that the defendant Peter E. Linquist attempted to dispose of this property with the purpose of putting it beyond the reach of creditors, and that the defendant Albert was a participant in the fraud, within the rule laid down in *Gumberg* v. *Treusch*, 110 Mich. 451 (68 N. W. 236).

The decree is affirmed, with costs.

The other Justices concurred.

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WHITE v. LAPEER CIRCUIT JUDGE.

PHYSICIANS—PRACTICING WITHOUT AUTHORITY—COMPLAINT—SUFFICIENCY.

A complaint under Act No. 237, Pub. Acts 1899, for practicing medicine without having obtained the prescribed certificate of registration, is sufficient if stated in the language of the statute, and need not specify the particular acts or means by which respondent practiced such science.

Mandamus by Enoch C. White, prosecuting attorney of Lapeer county, to compel George W. Smith, circuit judge of said county, to vacate an order quashing a criminal complaint. Submitted April 7, 1903. (Calendar No. 19,868.) Writ granted April 28, 1903.

White & Cramton, for relator.

Geer, Williams & Halpin, for respondent.

PER CURIAM. One A. H. Wesley was arrested, tried, and convicted of unlawfully practicing medicine contrary to Act No. 237, Pub. Acts 1899. He took an appeal to the circuit court. The respondent quashed the proceedings on account of a defective complaint. The relator now asks for the writ of *mandamus* to compel the respondent to vacate that order and to proceed with the trial.

It is alleged that the complaint is defective, in that it is general in its terms, is stated in the language of the statute, and does not specify the particular acts or means by which the defendant in that suit practiced medicine. This precise question was before the court, under a similar statute, in *People* v. *Phippin*, 70 Mich. 6 (37 N. W. 888). We there held the complaint sufficient.

The writ will issue.

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MARQUETTE & SOUTHEASTERN RAILWAY CO. *v.* LONGYEAR.

1. RAILROADS—CONDEMNATION PROCEEDINGS—PETITION—DESCRIPTION OF ROUTE—SUFFICIENCY.

   2 Comp. Laws, § 6243, provides that the petition in condemnation proceedings by a railroad company shall contain a statement that it is the intention of the company to construct a railroad from and to the places named in its articles of association. A petition for condemnation recited that the company was organized for the purpose of constructing a railroad from L. to the shore of Lake Michigan, at or near M.; that it had caused surveys to be made, and located its road in accordance therewith; and that it intended to construct such road from L. as far as R., "and thence to the shore of Lake Michigan." *Held*, a sufficient compliance with the statute.

2. EMINENT DOMAIN—PARTIES—MORTGAGEES.

   Where a petition in condemnation proceedings shows that petitioner has acquired the interest of the owner of a certain parcel, and a mortgagee of such parcel is made a party, the fact that the former owner is not also made a party does not deprive the court of jurisdiction.

3. RAILROADS—CONDEMNATION PROCEEDINGS—RIGHTS OF WAY.

   It is not necessary that a railroad company seeking to condemn a right of way under 2 Comp. Laws, § 6242 *et seq.*, shall embrace in one petition all lands within the county necessary to be so acquired for the construction of its road.

4. SAME—PARTIES.

   Hence an objection that certain persons not made parties to a proceeding are entitled to damages is without force.

5. EMINENT DOMAIN—AWARD OF JURY—CONCLUSIVENESS.

   An award of damages by a jury in condemnation proceedings, if within the legitimate scope of the testimony, will not be disturbed on appeal.

6. RAILROADS—RIGHTS OF WAY IN STREETS—COMPENSATION TO ADJOINING OWNERS.

   2 Comp. Laws, § 6234, subd. 5, provides that no railroad shall be constructed on any street until compensation shall have been made to the owners of property adjoining the street,

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and opposite where such railroad is to be constructed. *Held*, that the owner of property abutting on the opposite side of a street from that in which a road is to be laid is entitled to compensation.

7. SAME.

But property situated some distance from such street, with another street intervening, though used in connection with land abutting on the former street, is not "adjoining" property, within said statute.

Appeal from probate court, Marquette county; Kelsey, J. Submitted November 18, 1902. (Docket No. 94.) Decided May 1, 1903.

Proceedings by the Marquette & Southeastern Railway Company to condemn lands for a right of way. Respondents John M. Longyear and Mary H. Longyear appeal from the award and order of confirmation. Reversed in part.

Ball & Ball, for appellants.

George P. Brown (*Charles R. Brown* and *Henry M. Campbell*, of counsel), for appellee.

MOORE, J. This is a proceeding to review the action taken upon a petition presented to the probate court for the county of Marquette for the condemnation of a right of way for the petitioner's railroad across five parcels of land, of which the appellants were the owners, in whole or in part. The jury found it was necessary to take the land described in the petition for the purpose of said company's incorporation, as and for a right of way, and made the following awards:

Parcel No. 1	$700
" " 2	450
" " 3	400
" " 4	1,000
" " 5	1

It is claimed the court did not obtain jurisdiction, because the petition fails to state that it is the intention of

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the petitioner, in good faith, to construct, finish, and maintain a railroad to and from the places named for that purpose in its articles of association, as required by 2 Comp. Laws, § 6243, as amended by Act No. 80, Pub. Acts 1901, which provides that the petition for acquiring rights of way shall contain, among other things, a statement that the petitioner has a railroad constructed from and to points specified, or "that it is the intention of said company, in good faith, to construct, finish, and maintain a railroad * * * from and to the places named for that purpose in its articles of association."

That part of the petition material to the discussion of this question reads as follows:

"Your petitioner, the Marquette & Southeastern Railway Company, respectfully shows that it is a corporation duly organized under the railroad laws of the State of Michigan for the purpose of constructing, operating, and maintaining a railroad from the city of Marquette, commencing at a junction with the Lake Superior & Ishpeming Railway near Presque Isle, in said city of Marquette, in said county of Marquette, and running thence through the city of Marquette, southeastwardly, and through the counties of Marquette, Alger, and Schoolcraft, to the shore of Lake Michigan, at or near Manistique, in the county of Schoolcraft, a distance of eighty-five miles, as near as may be; * * * that the company has caused to be surveyed the route of its proposed road through said city of Marquette, and in said county of Marquette, as far as a junction with the Munising Railway, in the county of Alger, and has made maps of said survey of said route, by which said route is designated from the junction with the Lake Superior & Ishpeming Railway, in said city of Marquette, through the said city of Marquette, and has caused certificates of said maps, in due form, signed by a majority of the directors of said company, to be filed in the register of deeds' office of said county, and has located its said road through said city of Marquette on the survey as shown by said maps, and in accordance with such survey, and it is the intention of your petitioner, in good faith, to construct, finish, and maintain said railroad on the line as so located from said junction with said Lake Superior & Ishpeming Railway, through said city of Marquette and county of Marquette, as far as the said Munising Railway, in said

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county of Alger, as aforesaid, and thence to the shore of Lake Michigan; that the maps of said survey and located line of railroad, showing the line thereof on Lake street, and across Walnut street, in the city of Marquette, have been approved by the railroad crossing board of the State of Michigan; and that permission to construct said railroad in said Lake street, and across said Walnut street and other streets in said city of Marquette crossed by the same, has been granted by the common council of the city of Marquette in due form."

It is true, the petition does not follow the language of the statute literally, by saying the petitioner intends to construct the road "from and to the places named for that purpose in its articles of association;" but, when the petition is read as a whole, we think it is a substantial compliance with the statute. It recites that the company was organized for the purpose of constructing and maintaining a certain railroad, describing from what point to what point it is to be constructed. It then recites the amount of the capital stock of the company, and how much is paid in; that it has caused surveys to be made, etc., "and has located its said road through said city of Marquette on the survey as shown by said maps, and in accordance with such survey, and it is the intention of your petitioner, in good faith, to construct, finish, and maintain said railroad on the line as so located from said junction with said Lake Superior & Ishpeming Railway, through said city of Marquette and county of Marquette, as far as the said Munising Railway, in said county of Alger, as aforesaid, and thence to the shore of Lake Michigan." This could not be much more definite as to the route of the road from its commencement, in Marquette, to the junction with the Munising Railway, in the county of Alger; and it is not an unreasonable inference to draw from the language, "and thence to the shore of Lake Michigan," when taken in connection with the statement made in the earlier part of the petition, that the company had been organized to construct and operate a railroad commencing, etc., running, etc., "southeastwardly, through the counties of

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Marquette, Alger, and Schoolcraft, to the shore of Lake Michigan, at or near Manistique, in the county of Schoolcraft, a distance of eighty-five miles," that it in good faith intended to construct and operate the road to the last-named point. See *Bay City Belt-Line R. Co.* v. *Hitchcock*, 90 Mich., at page 541 (51 N. W., at page 810).

It is also said the court did not get jurisdiction as to parcel No. 1, because Hornstein and Russell should have been joined in the proceeding and served with notice. This claim is based upon the fact that Mr. Longyear had a mortgage on the parcel, given by Russell, Hornstein, and Blake; and it is said that, by reason of the failure to bring in Russell and Hornstein, it was impossible for the jury to consider the question of Longyear's mortgage interest. Mr. Longyear and Mr. Blake were made parties to the proceeding. The petition shows that, before the proceeding was commenced, Russell and Hornstein had conveyed all of their interest in the parcel of land to the petitioner, who, of course, was before the court. The record also shows that the value of the parcel taken, as fixed by the jury, was paid into court. See 2 Comp. Laws, § 6249; *Cincinnati, etc., R. Co.* v. *Bay City, etc., R. Co.*, 106 Mich. 473 (64 N. W. 471). This having been done, there will be no difficulty in taking care of the interest Mr. Longyear has, by reason of his mortgage, in the parcel condemned.

It is claimed there can be no condemnation of the parcels of land and right of way described in the petition, without including in the petition and proceedings such other parcels of land as are necessary for the construction of the road, and without which it cannot be constructed and operated even upon the parcels described, and upon which the right of way has not been obtained. Counsel say:

"The railroad company may take either one of two courses: *First*, to include in its condemnation proceedings all the lands, property, and franchises required for the construction of its road in the county; or, *second*, it

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may first contract for as much of the property required as it is able to do, and institute one condemnation proceeding for the rest."

It is argued that "the jury must first pass upon the necessity of the railroad as a public work, and then must pass upon the necessity of taking each piece of land for that purpose. One jury might find that the road was a public necessity; another might find the contrary. One jury might find that it was necessary to adopt the proposed route as adopted by the company, while another might find it not necessary. The whole subject of the necessity of the work as proposed, as well as the necessity of taking each parcel of property, is equally within the province of the jury to determine,"—citing the case of *Houghton Common Council* v. *Mining Co.*, 57 Mich. 547 (24 N. W. 820), and other cases.

A reference to these cases will show that the statute under which the proceedings were commenced authorized only a single proceeding, in which all the lands should be described. The statute which applies to railroads reads differently. Section 6242, 2 Comp. Laws, provides:

"In case any railroad company is unable to agree for the purchase of any real estate, property, or franchises required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act."

Section 6243 provides:

"For the purpose of acquiring such title, such company may present a petition," etc. "Said petition * * * shall contain the description of all the real estate, property, or franchises, or so much thereof as the company seeks to acquire under such petition in said county."

Section 6245, 2 Comp. Laws, contemplates "that any person or persons or company whose estate or interest is to be affected by the proceedings" may have a jury. Section 6232 permits a change in the route of the road, if necessary. Section 6251 provides that, if the proceeding results in the company securing a defective title, it may proceed anew to acquire a perfect title.

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These provisions are inconsistent with the idea that all the lands within the county required for the road must be included in one petition, and passed upon by one jury. Many cases have been before this court in which only a small number of parcels have been sought to be condemned, and in several instances only one parcel. While the precise question here involved has not been raised in any of these cases, that fact is significant, as indicating what the practice has been understood to be. The language of the statute indicates that the railroad company must acquire its right of way by negotiation with the parties, if practicable, and it is only when it cannot do so that it can resort to proceedings for condemnation. It may often happen that, by negotiation, the right of way will be secured for all of the proposed line, except isolated descriptions which are long distances from each other. If the conditions are such that it is desirable to have several or many parcels described in a single petition, and condemned in one proceeding, that may be done; but there is nothing in the statute that makes it necessary to embrace in one petition all of the descriptions in the county necessary for the construction of the road, where negotiations have failed.

As to parcel No. 5, it is said there was a failure to bring in all of the necessary parties. This objection relates to that portion of the right of way located in what the petition claims is Lake street. The appellants do not concede that what is called "Lake Street" is a highway. The right of way, so far as the common council could do so, was granted in this highway. The railroad is wholly on the south side of the center line of the street. The land on the south side of this street belonged to Mrs. Longyear. She also owned land on the north side, running west about 350 feet from Walnut street. The land west of her on the north side of the street was owned by other persons who were not made parties to this proceeding. It is insisted by the petitioner that, as the road is located and all of the property taken is south of the center line of the street, the

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property north of the street is not adjoining property, within the meaning of the statute, and that the owners thereof are not necessary parties to this proceeding. In our view of the law, we do not need to decide whether the persons on the north side of the street are adjoining owners, in the sense that they are entitled to have damages assessed before the road can be built.[1] These persons are not here complaining. If they have rights which the railway company has not acquired, they will not be precluded from asserting them because of a proceeding to which they are not parties. *Chicago, etc., R. Co.* v. *Sanford*, 23 Mich. 428. If we are right in holding that it is not necessary to embrace in one petition all the land in the county required for the construction of the road, this objection cannot be sustained.

It is said the award is contrary to the rights of Mrs. Longyear, because:

"As to parcel No. 5, the jury excluded from their award all consideration of the question of damages to the property of Mrs. Longyear lying north of, and abutting upon, what is called 'Lake street,' and also all question of damages to the remainder of the residence property by reason of the taking of parcels No. 4 and No. 5."

Mrs. Longyear is the owner of three tracts of land: *First*, a block of land in the center of which is her dwelling house, which block is about 750 feet east and west between Cedar and Walnut streets, and 300 feet north and south between Arch and Ridge streets; *second*, she owns the tract south of Ridge street, lying between Ridge and Lake streets, and extending 350 feet west from Walnut street; *third*, a tract south of Lake street, extending along the harbor front from the Grace Furnace Dock, so called, to the government lighthouse reserve. Petitioner's located line extends east along Lake street, south of its center, to Walnut street, and across the north side of that portion of the third tract above mentioned which lies east of the west line of Walnut street. The land required for right of way across this part of the tract is designated in the petition as

[1] See, however, page 106, *post*.

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parcel 4. That portion for right of way in Lake street opposite the remainder of the third tract is designated as parcel 5. Mrs. Longyear was awarded as compensation for the taking of parcel 4, and damages to the remainder of the lands from which it was taken, the sum of $1,000, and for damages to her lands lying south of Lake street she was awarded the nominal sum of $1.

There were many blue prints and some photographs offered in evidence, which cannot be reproduced here, which help very clearly to explain the situation. The railroad is south of the residence, and does not come within 300 feet of it. There is a space intervening from the house to Ridge street, then Ridge street, and then quite a deep lot and half of Lake street. On the east the right of way is at least 600 feet from the house,—four lots intervening, then Walnut street, and then a very considerable space before coming to the right of way. The jury viewed the premises. It was claimed on the part of Mrs. Longyear that all three tracts of land owned by her, and before described, were used in connection with her residence property, and that her damages would be at least $40,000. It was the claim of petitioner that damages should not be allowed, in making the award as to parcel 4, because of any supposed injury to Mrs. Longyear's residence property north of Ridge street and west of Walnut street, but upon the part of Mrs. Longyear testimony was given upon that subject. Witnesses upon the part of the petitioner as to the damages caused by the taking of parcel 4 differed in their estimates, ranging from $50 to $300, while the award made by the jury was $1,000. It is insisted upon the part of the petitioner that this award could not have been made without allowing something for damages to the residence property north of Ridge street and west of Walnut street, and to that part of the property between Lake street and Ridge street west of Walnut.

In *Michigan Air Line Railway* v. *Barnes*, 44 Mich. 222 (6 N. W. 651), Justice GRAVES, speaking for the court, said:

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"When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It was not intended to leave the fate of the determination had in view to any finespun theories, or to the refinements which are not uncommon in trials at the circuit. They were not supposed to be necessary to the fundamental purpose or beneficial working of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. And were the niceties of *nisi prius* to be insisted on, the proceeding would speedily break down under the perplexities and embarrassments due to its own methods. The conclusion to which these and other considerations lead is that a very large discretion in admitting and rejecting testimony is left to the jury, or the attending officer, whenever there is one, and that, when the case is brought here by appeal, the award cannot be disturbed on account of such decisions, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate, but was a cause of substantial injustice to the appellant in the matter of the result."

In *Toledo, etc., R. Co.* v. *Dunlap*, 47 Mich. 456 (11 N. W. 271), Justice CAMPBELL, speaking for the court, said:

"The judge formed no part of this special tribunal. The statute, indeed, allows the judge to 'attend said jury, to decide questions of law and administer oaths to witnesses.' Section 21, art. 2. But the same statute which allows this allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. Whatever the language of this statute, literally construed, may mean, it is very clear that any such functions must, at most, be advisory. The jury will undoubtedly be regarded as accepting and doing what they permit to be done. But in all such cases the Constitution, as well as the principles of the common law, makes them judges of law and fact. *Chamberlin* v. *Brown*, 2

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Doug. 120. Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear to be based on false principles, it cannot properly deal with rulings as if they were excepted to on a common-law trial, or dispose of the controversy on merely technical notions. *Chamberlin* v. *Brown*, 2 Doug. 120; *Michigan Air Line Railway* v. *Barnes*, 44 Mich. 222 (6 N. W. 651)."

In *Fort-Street Union Depot Co.* v. *Jones*, 83 Mich. 415 (47 N. W. 349), Justice GRANT, in speaking for the court, quoted with approval the language of Justice CAMPBELL in the case of *Toledo, etc., R. Co.* v. *Dunlap, supra*, and said:

"A careful examination of the testimony upon the question of values does not convince us that a case is made calling for the interference of this court. While, under the statute, this court may, upon appeal, set aside an award of the jury, and order a new appraisal, this should only be done where it is clear that the award is against the evidence. In this case the damages awarded were within the values placed upon the property by several witnesses. The jury knew the purpose for which the land was to be condemned, and we cannot say that they did not consider the value of the land for that purpose. They viewed the premises, saw the witnesses while testifying, and were chosen because of their supposed knowledge of the value of real estate in the vicinity. We cannot say that the award was against the evidence, or even against the weight of evidence."

We think this branch of the case comes within those decisions. The question of damages was one about which different persons would greatly differ. There was testimony upon which to base the award, and, if it were not for an error as to parcel 5, we should not think it our duty to disturb the award.

It is true, as to parcel 5, that the line of the road is south of the center of the street. Mrs. Longyear, as before

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stated, is the owner of the land between Lake street and Ridge street, and west of Walnut street. While it may be true, as contended by the petitioner, that, in the award of $1,000 for parcel 4, the jury took into consideration the damages to the above-described property, it is apparent they did not do so in awarding damages growing out of the taking of parcel 5. It is claimed on the part of the petitioner that, as the line of the road is south of the center of Lake street, it is not necessary that an award of damages to the land north of that street should be made to Mrs. Longyear before the railroad may be built, and that, if she suffers damages, she can recover them in an action at law after the line is completed; citing *Grand Rapids, etc., R. Co.* v. *Heisel*, 38 Mich. 62 (31 Am. Rep. 306). A reference to that case, however, will show it was not a condemnation proceeding, and the question whether damages must be determined before the road could be built was not involved. When the case was here the second time (*Grand Rapids, etc., R. Co.* v. *Heisel*, 47 Mich. 393 [11 N. W. 212]), Justice CAMPBELL, speaking for the court, said:

"Our American statutes, including our own previous to our statute of 1873, have been defective in not generally providing any statutory remedy for persons injuriously affected by the construction of public works, with the single exception of those who have had property taken specifically. But the statute now in force, and before referred to, has provided for the most important of these cases, in favor of adjacent proprietors whose situation on public or other ways makes them the real parties most injured by their use for railways, and has, to this extent, relieved the law from an anomaly which the English statutes have always guarded against. The English courts, in construing their statutes, have usually applied them, when they could do so, as covering such damages as would have been actionable if no authority had been given to do the injurious acts. And there has been no serious difference between the English and American courts in defining actionable rights. And where the company has not brought itself within the statutes, the common-law action has been fully maintained.

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"It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated; and in *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443, it was held that, where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business. In cases where damage is by injury aside from actual taking of property, the rule has been to make the party whole, as nearly as practicable; and, where it affected the rental value or enjoyment, the same principle has been applied as in other cases. There is no reason, and, so far as we can discover, no law, which allows the wrongdoer to cast any portion of an actual and appreciable loss on the party whom he injures. In such a case as this it is in the power of the company, and always has been, to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment."

The language of the statute (2 Comp. Laws, § 6234, subd. 5) is as follows:

"But such railway shall not be constructed upon any public street, lane, alley, highway, or private way until damages and compensation be made by the railroad company therefor to the owner or owners of property adjoining such street, lane, alley, highway, or private way, and opposite where such railroad is to be constructed, either by agreement between the railroad company and each owner or owners, or ascertain[ed] as herein prescribed for obtaining property or franchises for the purpose of its incorporation, to be paid to the owner thereof, or deposited as hereinafter directed."

This language is not ambiguous, and clearly gives Mrs. Longyear the right to have damages and compensation, as the owner of property adjoining Lake street on the north, if she has suffered any, before the railway can be constructed. See *Riedinger* v. *Railroad Co.*, 62 Mich. 29 (28 N. W. 775); *Nichols* v. *Railway Co.*, 87 Mich. 361 (49 N. W. 538, 16 L. R. A. 371). Because of this error,

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the award will be set aside as to parcel 5. We deem it proper to add that, as to the block of land upon which the residence is situated, we do not think it so adjoins Lake street that damages thereto should be given.

The other assignments of error have been considered. We do not regard them as tenable, and deem it unnecessary to discuss them.

The award is confirmed as to all the parcels, except parcel 5. The award as to parcel 5 is set aside, and the case is referred back to the same jury to appraise the damages caused by the taking of parcel 5 in accordance with this opinion.

The other Justices concurred.

HUNT, *ex rel.* SNOW, *v.* BUHRER.

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1. CONSTITUTIONAL LAW—OPERATION OF SCHEDULE TO CONSTITUTION—COUNTY OFFICERS—TERMS OF OFFICE—COMMENCEMENT—WAYNE COUNTY TREASURER.

   Section 28 of the schedule of the Constitution, providing that the terms of office of all State and county officers, etc., shall begin on the 1st day of January next succeeding their election, was not a permanent limitation on the power of the legislature, and did not prohibit the enactment of Act No. 294, Local Acts 1895, providing that thereafter the term of office of the treasurer of Wayne county should begin on the 1st day of July next succeeding his election, and continue for the term of two years from such date.

2. SAME—PARTIAL INVALIDITY OF STATUTE.

   Conceding the unconstitutionality of the proviso to said act, which undertook to extend the term of the then incumbent of said office for six months (*i. e.*, to July 1, 1897), the entire act was not thereby invalidated, since any vacancy in the office between the terms might be filled by appointment by the board of supervisors, under 1 Comp. Laws, § 2537.

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Error to Wayne; Hosmer, Brooke, Mandell, Donovan, Rohnert, and Frazer, JJ. Submitted April 21, 1903. (Docket No. 156.) Decided May 1, 1903.

Quo warranto by Ormond F. Hunt, prosecuting attorney of Wayne county, on the relation of Frederick F. Snow, against Charles A. Buhrer, to determine the title to the office of treasurer of said county. From a judgment for respondent, relator brings error. Affirmed.

C. K. Latham and *E. B. Latham* (*John J. Speed*, of counsel), for appellant.

Corliss, Andrus, Leete & Joslyn, for appellee.

CARPENTER, J. This is a proceeding in the nature of a *quo warranto* to determine who is entitled to the office of county treasurer of Wayne county during the six months from January 1 to July 1, 1903. Relator was elected to that office at the November election in 1902. Respondent was elected to that office at the November election in 1900. The controversy depends upon the constitutional validity of Act No. 294 of the Local Acts of the Legislature for the year 1895, which reads as follows:

"*The People of the State of Michigan enact*, that hereafter the term of office of the treasurer of the county of Wayne shall begin on the first day of July next succeeding his election, and continue for the term of two years from said first day of July: *Provided*, that the term of the present incumbent of the office shall end on the thirtieth day of June, eighteen hundred ninety-seven."

The judgment of the court below was in favor of respondent, and relator appeals to this court. He contended in the court below, and contends in this court, that said act is unconstitutional, for two reasons: (1) That its enactment was forbidden by section 28 of the schedule of the Constitution; and (2) that the provision lengthening the term of the incumbent of the office when the act took effect was unconstitutional, and impaired the validity of the whole act. We will discuss each of these questions.

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1. Was the enactment of the law forbidden by section 28 of the schedule? This section reads as follows:

"The terms of office of all State and county officers, of the circuit judges, members of the board of education, and members of the legislature, shall begin on the first day of January next succeeding their election."

If this provision was intended as a permanent limitation of the power of the legislature, the act under consideration was unconstitutional; otherwise it was constitutional. An examination of the decisions of this court throws some light upon the construction to be given to the provisions of the schedule. In *People* v. *Garlock*, 5 Mich. 284, the question before the court for decision was whether the term of office of a circuit judge elected in a newly organized circuit commenced immediately after the election, or on the first of the following January. In deciding that case, the court, through Mr. Justice CHRISTIANCY, said:

"It is admitted that there is nothing in the body of the Constitution itself to postpone the immediate operation of the act, and the commencement of the official terms as soon as the result of the election was officially determined. But section 28 of the schedule provides, 'The terms of all State and county officers, of the circuit judges, members of the board of education, and members of the legislature, shall begin on the first day of January next succeeding their election,' and it is claimed that this applies to the judges and other officers elected under this act.

"Whether this section of the schedule was intended to have any further effect than to provide for the period of transition from the old to the new Constitution, and to put the new Constitution into full operation, it does not become necessary here to decide; though, from the preamble or first clause of the schedule, declaring its purposes and the appropriate office of such schedule, it would seem that its chief object was to provide only for such transition, and to give any of its provisions a permanent and continuing operation, after the transition had been fully accomplished, the intent must be clear and manifest. But, admitting that this section was intended to have permanent effect as a part of the Constitution, still, after a careful examina-

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tion of the whole subject, we are satisfied it was intended only to apply to officers elected for the full term, and at the time fixed by the Constitution."

In *People, ex rel. Douvielle*, v. *Manistee Co. Sup'rs*, 40 Mich. 585, the question involved was whether the board of supervisors of Manistee county had a right to reduce the salary of the judge of probate after his election to that office. In the course of the opinion in that case, the court, through Mr. Justice CAMPBELL, said:

"The first ground taken by the relator, that the schedule to the Constitution fixes the rights of the judges not to have their salaries changed (schedule, § 20 [which reads as follows: "The salaries or compensation of all persons holding office under the present Constitution shall continue to be the same as now provided by law, until superseded by their successors elected or appointed under this Constitution; and it shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during the term for which he is elected or appointed"]), is, we think, untenable. The schedule was intended to provide for temporary, and not for future and permanent, purposes, and cannot be given a permanent operation in any case where any other interpretation is reasonable."

It is to be observed of this case that, notwithstanding the refusal to give relator relief on the ground that the schedule was permanent, he did receive relief in that case on the ground that the legislature had not delegated to the board of supervisors authority to reduce his salary, and that without such delegated authority the reduction could not be made.

In the case of *Board of Sup'rs of Houghton Co.* v. *Secretary of State*, 92 Mich. 638 (52 N. W. 951, 16 L. R. A. 432), it was decided that the provision in section 22 of the schedule, "each county having a ratio of representation and a fraction over equal to a moiety of said ratio shall be entitled to two representatives, and so on above that number, giving one additional member for each additional ratio," was a permanent limitation upon the power of the legislature. It is apparent from the reading

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of that decision that the court was very much influenced by the first part of the section, which reads:

"Every county, except Mackinaw and Chippewa, entitled to a representative in the legislature at the time of the adoption of this Constitution, shall continue to be so entitled under this Constitution."

In my judgment, all these cases are consistent with the principle announced by Judge CAMPBELL, that "the schedule was intended to provide for temporary, and not for future and permanent, purposes, and cannot be given a permanent operation in any case where any other interpretation is reasonable;" and with that announced by Judge CHRISTIANCY, "To give any of its provisions a permanent and continuing operation, the intent must be clear and manifest."

If we look at the declaration preceding the schedule, and at the schedule itself, we reach the same conclusion. The men who framed the Constitution, and the people who adopted it, declared the purpose of the schedule in the following words:

"That no inconvenience may arise from the changes in the Constitution of this State, and in order to carry the same into complete operation."

Under a schedule framed for this purpose, we have a right to believe that the makers of the Constitution would place no permanent limitation upon legislative power without using language which would unmistakably indicate their intent to make it permanent. If we examine in detail the provisions of the schedule, we find that some of them (like those which relate to the time and manner of adopting the Constitution itself) will have performed their entire office before the Constitution goes into effect; some of them (like those relating to the period of service of the legislators and county officers in office when the Constitution was adopted) will have performed their entire office in a limited time; others (like those relating to the common law and the police court of Detroit) will continue in

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force until changed by the legislature; while section 22, as heretofore stated, operated as a permanent limitation upon legislative power. If, therefore, the only reasonable construction that the courts can place on the language of section 28 is to hold that it permanently limits the power of the legislature to change the time of the beginning of the terms of county officers, the statute in question is unconstitutional; otherwise it is constitutional. Relator, in support of his claim that the only reasonable construction of said language is that of a permanent limitation on legislative power, advances several arguments, which we will notice.

It is said that section 8 of the schedule, which reads, "All county officers, unless removed by competent authority, shall continue to hold their respective offices until the first day of January in the year one thousand eight hundred and fifty-three," means by inference that the first county officers elected under the Constitution will take office January 1, 1853, and therefore that there was no occasion for section 28 as a *temporary* measure. The makers of the Constitution, and the people who adopted it, might not have desired that the beginning of the terms of office of the first officials elected under the Constitution should be left to inference; and, because they did not choose to so leave it, we are by no means compelled to infer an intent to permanently limit legislative power.

Nor is the word "temporary," in these decisions, used in any narrow sense. It is there used as opposed to "permanent," and not in the limited sense of referring to the immediate time the Constitution went into effect. Assuming that section 8 contains ample provision fixing the time when the first county officers elected under the Constitution shall take office, it certainly does not fix the time when their successors shall take office. The framers of the Constitution would have been short-sighted, indeed, if they had not made some provision to guard against the possible failure of the first legislature elected under this Constitution to enact a law fixing such time. Section 28

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of the schedule is such a provision, and a provision which, in our judgment, has the force of an act of the legislature. This care taken to prevent the possibility of a hiatus arising does not require us to hold that the legitimate power to legislate, otherwise existing, is thereby limited.

It is urged that we are bound to declare that the provision fixing the beginning of the terms of the other officials enumerated in this section—particularly those of members of the legislature—is permanent and continuous, and therefore that it should be held that the provision fixing the beginning of the terms of county officers cannot be changed by legislation. Relator's argument that the part of section 28 of the schedule which fixes the beginning of the terms of members of the legislature is permanent may be briefly stated as follows: The Constitution, read in connection with section 28, clearly requires that each legislature elected at the general biennial election in November shall assemble on the first Wednesday of the following January, and this requirement is not in the Constitution if section 28 is not a permanent provision. It is obvious that there is no force in this argument if the Constitution, without regarding section 28 as a permanent provision, requires each legislature elected in November to assemble on the first Wednesday of the following January. We think it does so require. The Constitution vests the legislative power in the senate and house of representatives. Section 1, art. 4. "Senators shall be elected for two years." Section 2, art. 4. "Representatives shall be chosen for two years." Section 3, art. 4. "The election of senators and representatives, pursuant to the provisions of this Constitution, shall be held on the Tuesday succeeding the first Monday of November in the year one thousand eight hundred and fifty-two, and on the Tuesday succeeding the first Monday of November of every second year thereafter." Section 34, art. 4. "The legislature shall meet at the seat of government on the first Wednesday in February next [this would be February, 1851], and on the first Wednesday in January of every second year

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thereafter, and at no other place or time, unless as provided in this Constitution." Section 33, art. 4. It is consistent with this opinion, and in accordance with our holding, that section 28 of the schedule did fix January 1, 1853, as the beginning of the term of office of the first legislature elected under the Constitution. It follows from this, and from the provisions above quoted, without giving permanent effect to section 28 of the schedule, that the legislature elected in November must thereafter assemble the following January. Otherwise the provision of the Constitution fixing two years as the term of office of its members would be violated.

We should not, in this connection, overlook the circumstance that in the body of the Constitution (see section 2, art. 8) it is expressly provided that the term of office of the secretary of State, superintendent of public instruction, State treasurer, commissioner of the land office, auditor general, and attorney general shall commence on the 1st day of January, 1853, and of every second year thereafter. These are the State officers referred to in the clause "all State and county officers." So far as these State officers are concerned, no principle of construction requires the language of section 28 of the schedule to be given permanent effect.

Nor do we think it follows that because the legislature has not in fact, since the Constitution took effect, changed the time at which these terms of office begin, therefore it has no power to make that change. As well might it be urged that, because the legislature has not repealed or amended many of the Revised Laws of 1846, therefore it has no power to repeal or amend said laws.

It follows from this reasoning that a reasonable construction can be given to section 28 of the schedule without giving its language the force of a permanent limitation upon the power of the legislature to change the time for the terms of county officers to begin, and therefore it is our duty to declare that it is not such a limitation.

2. Does the proviso in the act, extending the term of

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the incumbent of the office of county treasurer, elected in November, 1894, for six months after the term for which he was elected, render the whole act unconstitutional? We are so well satisfied with the following reasoning of Judge Hosmer (who prepared the opinion in the circuit court) on this branch of the case that we make it a part of this opinion:

"But it is further urged that the act is void as it attempts to continue a treasurer in office after the expiration of his term. It is unnecessary, in our view of the case, to decide whether this provision is constitutional. It is at least of extremely doubtful validity. But, admitting its unconstitutionality, we do not regard it as controlling the act and rendering the whole void. It was, at most, only an incidental feature, to facilitate the carrying out of the act. That the whole scheme must necessarily fail because of the invalidity of the proviso, and a vacancy between terms, does not follow. It is quite probable the legislature might have provided for an election to fill this vacancy between terms at the general fall election, had the objection been raised at the time of the passage of the act; but we cannot credit a co-ordinate branch of the government with such a desire to extend the term of the then incumbent that they would not have enacted the law without the proviso. Any one familiar with the business of the treasurer's office at the time of the passage of the act, and with the difficulty of the payment of the taxes of Detroit before the 1st day of January under the then existing circumstances, can readily appreciate the inconvenience of turning over the office to a new official at such a time.

"Vacancies may occur and be filled until an election can take place. The requirement that a vacancy shall be filled by election is in furtherance of the spirit of local self-government, and it does not tend to support counsel's contention that a change in the term of office is inhibited. Section 2537, 1 Comp. Laws 1897, provides, in case of a vacancy or disability, for appointment by the supervisors until the vacancy is filled or the disability removed. This section has stood unchanged since 1846. Rev. Stat. 1846, tit. 3, chap. 14, § 38; 1 Comp. Laws 1857, § 380; 1 Comp. Laws 1871, § 514; 1 How. Stat. § 522. See, also, Rev. Stat. 1838, pt. 1, tit. 3, chap. 3, § 23. Can it be contended

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in the case at bar that such an *ad interim* appointment is unconstitutional, or that the supervisors might not have appointed a person to succeed the then incumbent until an election might have been had to fill the vacancy occurring between the terms of office in consequence of the act of the legislature?"

It results from this reasoning that the judgment of the court below must be affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. HOOKER, C. J., did not sit.

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BOARD OF EDUCATION OF DETROIT *v.* STATE BOARD OF ASSESSORS.

TAXATION—RAILROADS—STATE BOARD OF ASSESSORS—AUTHORITY—RATE OF TAXATION.

The State board of assessors, provided for by the amendment of 1900 to article 14 of the Constitution, and Act No. 173, Pub. Acts 1901, in determining the average rate of taxation on property throughout the State other than railroad property, with a view to the assessment of the latter, should take as a basis the actual assessed valuation of such other property, as reported to it in accordance with said act, and it has no authority to increase such valuation on the theory that the assessments were too low.

Mandamus by the board of education of the city of Detroit to compel the State board of assessors to correct an assessment. Submitted April 22, 1903. (Calendar No. 19,876.) Writ granted May 1, 1903.

T. E. Tarsney, *P. J. M. Hally*, and *A. B. Hall*, for relator.

Charles A. Blair, Attorney General (*Roger Irving Wykes*, of counsel), for the people.

A. F. Freeman and *J. C. McLaughlin*, for respondent.

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MONTGOMERY, J. This is an application for a *mandamus*. It sets out, in substance, that the State board of assessors, in levying the tax upon the railroad property of this State, has assumed to fix the rate of taxation by dividing the total tax levy on all property other than railroad property by the value of such other property as determined by the defendant board by adding to the actual assessed value of such property as fixed by the local assessors and by the board of State tax commissioners, acting under the authority of the law relating to the assessment of taxes, the sum of $296,748,142, thus making the aggregate divisor in determining the rate of taxation that much in excess of the assessed valuation, thereby reducing the rate to be levied upon the railroad property of the State, and thus reducing the amount which relator would receive as its portion of the tax assessed against railroad property by a very substantial sum.

The answer discloses that the respondent board, entertaining the view that local assessors had failed to assess property at its full value, has assumed to exercise the right to determine the actual value of the property of the State for the purpose of fixing the rate to be levied upon railroad property under the terms of Act No. 173 of the Public Acts of 1901. The sole question presented in the case is whether the respondent board has this power. The question is an important one, and we have the aid not only of able briefs and arguments presented by relator and by Mr. Freeman, the president of the respondent board, appearing in his own behalf, but also a carefully prepared brief, supported by a clear and able argument, by the attorney general, who intervened on behalf of the State.

For many years the statutes of this State have provided for the assessment of property at its full cash value. In 1899 the legislature, with the purpose of correcting supposed abuses on the part of the assessing officers, by Act No. 154, provided for the creation of a board of State tax commissioners, by adding various sections to the tax law. Extensive powers were conferred upon this board. Its

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members were to have and exercise general supervision over the supervisors and other assessing officers of the State, and were authorized to take such measures as should secure the enforcement of the provisions of the law, to the end that all properties in the State liable to assessment should be placed upon the assessment rolls, and assessed at their actual cash value. The act provided that each county in the State should be visited at least once in each year by a member of the board. It authorized the board to require property omitted from the assessment rolls to be placed thereon, and an increase of the valuations as fixed by the local assessing officers. It went so far as to permit the setting aside a roll wholly which was found to be so grossly irregular and unlawfully assessed as to make such action expedient or necessary. It is in the light of these provisions of the statute that the constitutional amendment to article 14, adopted in 1900, is to be read. This amendment contains three sections, and reads as follows:

"SEC. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations at its true cash value by a State board of assessors, and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November sixth, A. D. nineteen hundred, shall be applied as provided for specific State taxes in section one of this article.

"SEC. 11. The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided*, that the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State board of assessors, and the rate of taxation on such property shall be the rate which the State board of assessors shall ascertain and determine is the average rate levied upon other property upon which *ad valorem* taxes are assessed for State, county, township, school, and municipal purposes.

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"SEC. 13. In the year one thousand nine hundred and one, and every fifth year thereafter, and at such other times as the legislature may direct, the legislature shall provide for an equalization of assessments by a State board on all taxable property except that taxed under laws passed pursuant to section ten of this article."

Pub. Acts 1901, p. 404.

Acting under the authority of this constitutional amendment, Act No. 173 of the Public Acts of 1901 was enacted, and it is provided in section 11 that:

" It shall be the duty of the county clerk in each county in this State, as soon as possible after the equalization of the board of supervisors of his county of the assessment rolls of the several municipalities therein, * * * to make a report, duly certified, to the State board of assessors of the record of such equalization, * * * which report shall, among other things, contain a statement of the amount of *ad valorem* taxes to be raised in the several municipalities of such county for State, county, municipal, township, school, and other purposes, and a statement of the aggregate valuation of the property in each of said several municipalities, as taken from the assessment rolls of said municipalities for the year in which such equalization is made."

Section 12 provides that, as soon as the reports required by the preceding section to be filed have been filed, or the information therein required to be procured shall have been procured, and not later than the 15th day of December in each year, the said State board of assessors shall ascertain and determine the average rate of taxation for the then current year levied upon other property upon which *ad valorem* taxes are assessed for State, county, township, school, and municipal purposes.

A fair reading of this language of the statute, we think, leads to the conclusion that the board of assessors has imposed upon it the duty, ministerial in character, of determining by a computation from *data*, which the law provides for placing in its hands, the rate of taxation which other property in the State is subjected to, as it appears by assessment rolls which are supposed to contain an

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accurate and true assessment of all property at its full cash value. It is true the language is employed here, as it is in section 11 of the amendment, that the board of assessors shall ascertain and determine the average rate levied upon other property; but the general tenor of Act No. 173 clearly indicates the manner in which that determination is to be made, and the term does not necessarily import of itself a determination judicial in its nature.

But it is urged in behalf of the power exercised by the board in this case that, if the act is subject to this construction, it is in conflict with the constitutional amendment itself. In determining this question, under well-settled rules, we are not to ignore the contemporaneous construction placed upon the amendment by the legislature itself. But we think there is no difficulty in construing the constitutional amendment. The language of the amendment is that the property described shall be assessed; that the rate of taxation on such property shall be the rate which the State board of assessors shall *ascertain* and determine is the average rate *levied upon other property upon which ad valorem taxes are assessed for State, county, township, school, and municipal purposes.* We think the clear intent and purpose of this provision is that the rate which is actually levied upon property actually assessed is the rate contemplated by the language employed. This constitutional provision cannot be segregated from other provisions relating to the subject of taxation. Construed in the manner above indicated, it is in entire accord with our whole system of taxation, which is not only that railroad property, but that all other property, shall be assessed at its cash value, and that all classes of property shall bear the burden of taxation equally. When this is said, it is meant, of course, as nearly equally as human frailty or erring human judgment renders possible. As was said by Judge COOLEY, in his work on Taxation (pages 221, 222, 2d Ed.):

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce

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unequal and unjust results in individual instances; and, if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical."

See, also, *Com.* v. *Bank*, 5 Allen, (Mass.) 428; *Grim* v. *School District*, 57 Pa. St. 433, 437 (98 Am. Dec. 237).

It was suggested in argument that, were we to adopt the view that the power was vested in the State board of assessors to ascertain and determine according to its own judgment the value of the property other than railroad property throughout the State upon which taxes have been assessed, inasmuch as the statute (Act No. 173, above cited) makes no provision for notice to the railroad companies whose assessment is to be determined by taking such valuation as a divisor, it would present a grave constitutional question as to whether the legislature had not exceeded its powers in reposing this authority in the board of assessors. In the view we have taken of the main question, it becomes unnecessary for us to determine whether such a delegation of power would be beyond the constitutional authority of the legislature. We, however, entertain no doubt that, under the construction we have placed upon this provision, the legislature was well within the limits of its authority. It has fixed a method through which, by mathematical computation, the exact rate shall be determined, and, as we have seen, this is based upon definitely ascertained *data* which is committed to the hands of the State board of assessors.

The writ of *mandamus* will issue as prayed, but without costs.

The other Justices concurred.

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GRAND RAPIDS & INDIANA RAILWAY CO. *v.* CHARLEVOIX CIRCUIT JUDGE.

MANDAMUS—WHEN LIES.

Mandamus will not lie to vacate an order sustaining a demurrer to a plea in abatement. *Carpenter* v. *St. Clair Circuit Judge*, 122 Mich. 323, overruled.

Mandamus by the Grand Rapids & Indiana Railway Company to compel Frederick W. Mayne, circuit judge of Charlevoix county, to set aside an order sustaining a demurrer to a plea in abatement. Submitted May 1, 1903. (Calendar No. 19,929½.) Order to show cause denied May 1, 1903.

James B. Howard, for relator.

PER CURIAM. This is a petition for *mandamus* to compel the respondent to set aside an order sustaining a demurrer to a plea in abatement. The case is ruled by the case of *Michigan Mut. Fire-Ins. Co.* v. *Wayne Circuit Judge*, 112 Mich. 270 (70 N. W. 582), in which it was attempted to fix a rule for these cases, and which was followed in *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417 (72 N. W. 249), *Reed* v. *St. Clair Circuit Judge*, 122 Mich. 157 (80 N. W. 985), and *Improved-Match Co.* v. *Michigan Mut. Fire-Ins. Co.*, 122 Mich. 259 (80 N. W. 1088). It seems that these cases were overlooked at the time of the decision of *Carpenter* v. *St. Clair Circuit Judge*, 122 Mich. 323 (81 N. W. 95).

The order to show cause is denied.

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METCALFE v. CARR.

SALE OF DEVISED LANDS—PETITION—VERIFICATION—OFFICIAL CHARACTER OF NOTARY.

A petition under 3 Comp. Laws, § 9234 *et seq.*, authorizing the sale of lands on petition under oath of a devisee of a life estate therein, which is verified in a foreign State, and contains no clerk's certificate to the official character of the notary before whom the verification was made, is fatally defective.

Appeal from Wayne; Donovan, J. Submitted November 19, 1902. (Docket No. 101.) Decided May 12, 1903.

Petition by Mary A. Metcalfe against Nerve D. Carr and others for the sale of certain devised lands. From an order dismissing the petition, petitioner appeals. Affirmed.

James Swan, for petitioner.

John H. Goff, *Frank P. Guise*, and *Wilkinson & Younglove*, for defendants.

HOOKER, C. J. The petitioner is the widow of Samuel Miller, who died testate in Detroit about December 1, 1881. The will was duly probated. Its provisions for petitioner were: (1) A devise of $10,000, to be held, controlled, and used by her during her life; whatever should remain at her death to become a part of his estate. (2) After providing legacies for several persons, he directed that the rest, residue, and remainder of all the property, real, personal, and mixed, should go to his heirs at law as the same would be distributed by the law of descent of the State of Michigan as it then was. In March, 1883, the probate court made an order that the residue of real property be adjudged and decreed to belong to the petitioner

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during her natural life. This property consisted of several tracts and lots which are described in the petition.

The petition was filed under 3 Comp. Laws, § 9234 *et seq.*, and alleges that the estate has been closed since April, 1884; that she is owner by purchase of one seventy-second of the fee, in addition to her life estate. It names the other persons interested in the fee, alleges a necessity for sale, and prays that it be sold, and the proceeds divided, as "provided by the statute." This petition was filed in the circuit court in chancery. An order to show cause was served on some of the defendants, and, others being nonresident, publication was made. Some of the defendants appeared and answered. At least one questioned the jurisdiction. Several persons mentioned in the petition as parties in interest did not appear. Upon their motion the proceedings were dismissed, with costs, upon the following grounds:

1. Because it did not appear that the petition was under oath, inasmuch as there was no clerk's certificate to the official character of the notary, and verification having been made in California.
2. It was not made to appear that the order was published in the county where petitioner resided; *i. e.*, Los Angeles county, Cal.
3. Because it appears by the will of Samuel Miller, a copy of which is attached to the petition herein, that the heirs at law of said Samuel Miller were devised the same estate in the land mentioned in said petition as they would take by descent had the said Samuel Miller died without a will, and because the statute, as amended, entitled "An act to authorize the sale in certain cases of land devised or bequeathed by will without power of sale," is not applicable to the lands set forth in the petition.

The first point made is sufficient to require the affirmance of the order dismissing the petition. The case is ruled by the following cases: *Platt* v. *Stewart*, 10 Mich. 260; *Coleman* v. *Stearns Manfg. Co.*, 38 Mich. 34; *Colton* v. *Rupert*, 60 Mich. 325 (27 N. W. 520); *Adams* v. *Wayne Circuit Judge*, 98 Mich. 51 (56 N. W. 1051).

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As some of the parties are not before the court, we do not dispose of the other questions.

The order is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

PEOPLE v. PRATT.

1. CRIMINAL LAW — WITNESSES — GRAND JURY — COMMUNICATIONS TO JUDGE — DISCLOSURE — PRIVILEGE.

Respondent, having been subpœnaed by the grand jury, informed the prosecuting attorney that he would like to talk with some one in whom he had confidence before testifying, and asked if he could not see the judge who had impaneled such jury. The prosecutor took him to the judge's room, to whom respondent stated that he wanted advice. The judge said that he could not give him any advice, and suggested that he see an attorney; but respondent objected that he was not acquainted with any attorneys who were accessible. The judge thereupon told him that he could not advise him for his personal benefit, but would say that, while he was not obliged to testify to anything before the grand jury to incriminate himself, if he did testify, he should tell the truth, whatever it was; whereupon respondent, after a little delay, made a confession to the judge. *Held*, that such confession was a confidential communication, within the principle applicable to the relation of attorney and client, and was inadmissible against respondent.

2. SAME.

Such communication, having been made to the judge in control of the grand jury, before whom respondent had been called as a witness, and might by such judge be compelled to testify, was likewise privileged, within the rule governing testimony before such jury.

GRANT, J., and HOOKER, C. J., dissenting.

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Exceptions before judgment from Ingham; Wiest, J. Submitted November 20, 1902. (Docket No. 219.) Decided May 12, 1903.

Charles H. Pratt was convicted of bribery. Reversed.

Alex. J. Groesbeck, *Q. A. Smith*, and *O. J. Hood*, for appellant.

Horace M. Oren, Attorney General, and *Arthur J. Tuttle*, Prosecuting Attorney. (*Watts S. Humphrey*, of counsel), for the people.

CARPENTER, J. Defendant was convicted under an indictment in which he was charged with unlawfully and corruptly promising the sum of $20,000 to a member of the house of representatives of the State of Michigan, with intent to influence the act, vote, decision, and judgment of said member, in his legislative capacity, on a certain joint resolution then and there pending in the house of representatives, and with unlawfully and corruptly giving said sum to said member with said intent to influence his action on said resolution. Defendant assigns 116 errors. We deem it necessary, however, to discuss but one of these assignments. That relates to the admission of the testimony of Hon. Rollin H. Person, the judge of the Ingham county circuit court at the time the defendant was indicted. Defendant was subpœnaed as a witness before the grand jury. Arthur J. Tuttle, the prosecuting attorney of said county, testified:

"Mr. Pratt said to me: 'I would like to talk to some attorney before I go before the grand jury. I have been up to see Judge Cahill, and for some reason he could not talk to me about it. * * * I would like to see some one that I have confidence in, before I go before the grand jury and give my testimony. Where is Judge Person? Couldn't I see him and talk to him?' I took him to Judge Person's room, and introduced him to Judge Person, and they were together for some time, and Mr. Pratt then went back before the grand jury."

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Before Judge Person testified, he said:

"While it is immaterial to me personally, I think I ought to raise the question whether I should state matters that came to me in that way, when I was on the bench; that is, whether it is against public policy for me to be required to state them. * * * Mr. Pratt said that he was before the grand jury, and wanted to get some advice. I said, 'Mr. Pratt, I cannot give you any advice.' He stood a moment, irresolute, and I said, 'I will say this to you,—that you are not obliged to say anything before the grand jury to criminate yourself.' He said he knew that, but he wanted advice as to what course he ought to pursue for his benefit. I said, 'Mr. Pratt, you had better see an attorney.' He said: 'I have seen an attorney here, but got no advice from him. I am not acquainted with the attorneys here, and I don't know how much they may be employed in these matters by various parties against my interest,—where they would conflict our interests.' 'Well,' I said, 'I cannot give you any advice as to what you ought to do for your personal benefit, but you are not obliged to testify to anything that will incriminate yourself; but, if you do testify, I will say this much to you: Tell the truth, whatever it is.' He stood for a moment, and burst into tears, like a baby, and said, 'That is the last thing my wife said to me before I left home,—was to tell the truth, whatever I told;' and he dropped into a chair and cried; and in a moment he straightened up and he said: 'I must tell. I won't stand this any longer.' And he went right on rapidly and told his story."

At this point, defendant's counsel objected to Judge Person's testimony on the ground that the communication in question was confidential, and its disclosure forbidden on grounds of public policy. The trial court ruled that there was nothing exempting Judge Person from testifying (to which ruling defendant excepted), and he proceeded and detailed the statement made to him by defendant. The testimony detailing this statement occupies about 3½ pages of the printed record. It may be described briefly as follows: Defendant, with the co-operation of a certain prominent State official, planned to corruptly secure the adoption of a certain joint resolution. To carry

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out this plan, defendant delivered drafts to the amount of $20,000 to a prominent member of the house of representatives.

It is to be noted that the purpose of the defendant (though this does not appear to have been known to Judge Person) was "to talk with some one he had confidence in." It is obvious, too, that this confidence was given by reason of Judge Person's professional and official position, and of the advice given by him to defendant. Is the communication made under these circumstances to be regarded as confidential, and its disclosure forbidden by principles of public policy? Counsel for the people has neither in his argument nor brief endeavored to sustain the ruling of the court below. He has taken a course which merits the highest commendation. Apparently doubtful of the propriety of the ruling permitting this disclosure, he has not endeavored to support it by inapplicable argument or authority. He has contented himself with saying:

"This matter received the careful attention of counsel in the court below. The court admitted the testimony. It is for this court to say whether or not that decision was correct. If it was correct, there is no error in this case. If incorrect, the conviction should be set aside and defendant discharged, for without this testimony another conviction cannot be obtained."

It seems to us that the principle which prohibits the disclosure of communications between attorney and client prohibits the disclosure under consideration. That principle is found in the common law, and is not confined in its application to cases where the technical relation of attorney and client exists. In the case of *People* v. *Barker*, 60 Mich., at page 297 (27 N. W. 546, 1 Am. St. Rep. 501), this court, speaking through Mr. Justice CHAMPLIN, said:

"Confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice."

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The principle extends to communications made under the erroneous belief that the party consulted had consented to act as counsel. *Smith* v. *Fell*, 2 Curt. Ecc. 667. The privilege is not confined to communications made for the purpose of obtaining advice. It extends to "communications made to an attorney in the course of any professional employment, relating to the subject of the employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other." *Williams* v. *Fitch*, 18 N. Y., at page 551. It is not material that no fee has yet been paid or is to be paid. *Sargent* v. *Inhabitants of Hampden*, 38 Me. 581; *Wade* v. *Ridley*, 87 Me. 368 (32 Atl. 975); *Davis* v. *Morgan*, 19 Mont. 141 (47 Pac. 793).

Have these principles any application to the question under consideration? Defendant informed Judge Person that he wished advice as to what course he should pursue for his benefit. When advised by Judge Person to see an attorney, he made known the circumstances which prevented his acting in accordance with this advice. Thereupon Judge Person said:

"I cannot give you any advice as to what you ought to do for your personal benefit, but you are not obliged to testify to anything that will incriminate yourself; but, if you do testify, I will say this much to you: Tell the truth, whatever it is."

This statement of Judge Person was obviously advice, and it was advice which properly should, and in this case did, come from a lawyer to a layman who desired to be advised. It is immaterial that the advice is so simple that an intelligent layman could have given it. This would perhaps characterize the best legal advice that ever was given, but it would be legal advice none the less. If it were true that the course of action prescribed by this advice was the only proper course to pursue, a relation of confidence nevertheless resulted from its being given. But it is not true that the course of action prescribed by this advice is the only course an honest lawyer might have

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advised defendant to follow. It is quite conceivable that a lawyer having regard to the personal interests of defendant, acting from the highest motives, might have said: "Testify to nothing that is not true, but, if you are asked to testify to anything that may incriminate you, I advise you to decline to answer, upon that ground." It is clear that defendant then and there decided to adopt and act upon the advice which Judge Person had given him, and, as a result, gave his confidence, and made the communication under consideration.

If Judge Person had not been, as he was, the judge of the circuit court for the county of Ingham, who had convened the grand jury, the principles of law above referred to would have prevented his disclosing the communication respondent made to him. It is true that Judge Person's position as judge of the circuit court prevented his becoming, in law, respondent's attorney. But it did not, in fact, prevent his advising respondent what course to pursue. How is the principle which regards as confidential communications between attorney and client affected by the fact that the attorney in this case was also a judge? If it be true that the fact that the attorney was the judge prevented his legally acting as attorney, it is also true that the fact that he occupied that position gave an increased weight to his advice. The reasons for regarding as confidential communications made in consequence of advice from an ordinary attorney apply with full force, and are re-enforced by others, when that advice emanates from an attorney who is also a judge. The law protects these communications as confidential, because of the nature of the confidence which exists between the client and the attorney of his choice. That confidence is not diminished, but is increased, when the advice is given by the judge, authorized not merely to express an opinion, but to declare the law. Not often will a judge undertake to give legal advice. Circumstances may, however, as in this case, make it his duty to give it. When they do, he will not, in any technical sense, become the attorney of the person

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to whom it was given. But if, as a result of such advice, he receives the confidence of that person, the principles of public policy applicable to attorney and client require that confidence to be respected.

I think our decision in this case might be based on another ground, viz., the communication under consideration is privileged because made to the judge in control of the deliberations of the grand jury, before whom defendant had been called as a witness. Defendant, wishing advice as to what testimony he should give before the grand jury, and having no opportunity to consult a lawyer of his own choice, went directly to Judge Person, who had the power to compel him to testify. See *People* v. *Forbes*, 143 N. Y. 219 (38 N. E. 303); *Minters* v. *People*, 139 Ill., at page 365 (29 N. E. 45). If defendant had gone before the grand jury, and had refused to answer questions put to him, his right to persist in such refusal would have been determined by Judge Person. See above cases. It is obvious that whatever Judge Person thus learned—and in that event he would have learned what testimony defendant had given—would have been privileged. If in that manner Judge Person had learned all that he did by the communication under consideration, the entire disclosure would have been privileged. Is it to be said that, because defendant anticipated his dilemma, and obtained this advice shortly before it was necessary to act upon it, he thereby loses the privilege which he would otherwise have had? I do not think so. I think we should look upon Judge Person as the judge in charge of the grand jury, the advice given by him as advice respecting tesitimony to be given before said grand jury, and that we should therefore decide that the communication made in consequence thereof is privileged, in accordance with the principle that governs testimony before said grand jury.

It follows from this reasoning that there was error in receiving the testimony of Judge Person; and inasmuch as, according to the statement of counsel, and according

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to our own judgment of the record, there can be no conviction without this testimony, the conviction will not only be set aside, but the defendant will be discharged from custody.

MOORE and MONTGOMERY, JJ., concurred with CARPENTER, J.

GRANT, J. (*dissenting*). A grand jury had been summoned by the circuit court of Ingham county, Judge Person presiding. One of the subjects under investigation by the grand jury was an attempt to bribe legistators to secure the passage of a certain bill then pending before the legislature. The respondent was the agent of and represented a corporation in the attempt to secure the passage of this bill. Undoubtedly the respondent believed that he was summoned as a witness before the grand jury to testify in regard to this transaction. Before going before the grand jury he went to the presiding judge, and made a voluntary confession of his crime. He knew that the presiding judge could not act as his attorney or counsel, any more than could the prosecuting attorney. To hold that he believed that the judge could so act would be a reflection upon the respondent's common sense and intelligence. He was a man of age and experience, and the trusted agent of a large corporation. I do not think that it can be said, under this record, that he approached the presiding judge and made his confession with any idea that he stood to him in that confession in the relation of client and attorney. The confession was made not only without any threats or promises, or even inducements, but after the presiding judge had told him that he could not advise him; thus practically saying to him: "You know that the relation between us is not that of client and attorney, and cannot be, and that whatever you say to me is not privileged, under the law." Every one knows that a presiding judge cannot advise litigants, for it would disqualify him from sitting in the case. It is immaterial what the motive of respondent was in making this confes-

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sion,—whether he did it from sting of conscience, or from repentance for his error, or a desire to escape sentence, or in order to obtain a lighter one. The confession was not made as an informer, for the purpose of causing an investigation into the crime of others. It was no less a confession, pure and simple, because it involved other participants in the crime. As against such participants, the confession would not be competent evidence, at least until a conspiracy had been established by other evidence. Confessions are potent evidence of guilt when made voluntarily, without threats, promises, or duress. See *Daniels* v. *State*, 6 Am. St. Rep. (78 Ga. 98) 238, and note.

It will be conceded that there is no statute of this State covering the case. The only statutory privileged communications are where a confession is made to a priest "in the course of discipline enjoined by the rules or practice of such denomination" to which such priest belongs (3 Comp. Laws, § 10180), and information acquired by a physician in attending a patient in his professional character, which information must be necessary to enable him to prescribe (3 Comp. Laws, § 10181). Under these statutes, confessions of crime made to a physician, not necessary for the physician's prescription, or to a priest, not in accordance with the discipline of his church, would be competent. At the common law, communications to clergymen and physicians were not privileged. 1 Greenl. Ev. (16th Ed.) § 247*a*. The question of communications by a layman to his priest arose in the English courts, and the court said:

"It is not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law. It is a principle of our jurisprudence that justice should prevail, and no unrecognized privilege can be allowed to stand in the way of it." *Normanshaw* v. *Normanshaw*, 69 L. T. Rep. (N. S.) 468.

The common law throws the mantle of secrecy over two classes of communications, viz., between lawyer and client, and between government officials and informers. What is the basis of this rule of the common law? Such com-

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munications are not excluded for the protection of criminals, but solely on the ground of public policy. Many efforts have been made before the courts to ascertain who informed government officials of frauds and crimes against the government, but the testimony has been universally excluded, not for the purpose of protecting the informer against prosecutions, but solely because public policy requires that this information, so essential to protect the government from frauds and crimes, should not be made public; otherwise the government would suffer, for it is evident that but few, if any, would give such information if they knew that it could be made the basis of a libel suit, or could be used against them in other ways. See *Worthington* v. *Scribner*, 109 Mass. 487 (12 Am. Rep. 736); *Rex* v. *Akers*, 6 Esp. 125; *Attorney General* v. *Briant*, 15 Mees. & W. 169; *Robinson* v. *May*, 2 Smith, J. P. Eng. 3; *Beatson* v. *Skene*, 5 Hurl. & N. 838. In *Shinglemeyer* v. *Wright*, 124 Mich. 230 (82 N. W. 887, 50 L. R. A. 129), we said:

"The defendant did not make these statements for repetition. He made them for the exclusive use and benefit of the trusted and sworn officers of the law. They should have been forever locked in their breasts, and never disclosed; otherwise, few persons would dare to disclose to an officer the name of a suspect, or anything they had learned about his character."

This rule also covers communications made to those in authority, relative to the character and conduct of a party applying for a public office. *Earl* v. *Vass*, 8 Scotch App. Cas. 229; *Garn* v. *Lockard*, 108 Mich. 196 (65 N. W. 764); *Pollasky* v. *Minchener*, 81 Mich. 280 (46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516); *Bacon* v. *Railroad Co.*, 66 Mich. 166 (33 N. W. 181); *Wieman* v. *Mabee*, 45 Mich. 484 (8 N. W. 71, 40 Am. Rep. 477).

This case is not within the principle of those above cited. Evidence of these communications is rejected "upon the ground of public policy, because greater mischiefs would probably result from requiring or permitting its admission

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than from any refusal to receive it." 23 Am. & Eng. Enc. Law (2d Ed.), 50.

The rejection of this testimony is sought upon the basis of the existence of the relation of attorney and client. The authorities hold that "it is absolutely essential, in order to make the communication privileged, that the relation of attorney and client should have existed," and that "the communication must be made solely on account of the relation of attorney and client, and for the purpose of obtaining professional assistance or advice," etc. 23 Am. & Eng. Enc. Law (2d Ed.), 58, 62, and authorities there cited: *Bramwell* v. *Lucas*, 4 Dowl. & R. 367. If that relation existed, the evidence is inadmissible; otherwise it is admissible. There is no privilege for a confidential communication, merely as such. 1 Greenl. Ev. (16th Ed.) § 248. It is not a question of sentiment, but of law. The language of Lord Camden, quoted in Greenleaf on Evidence, is appropriate here:

"It is not befitting the dignity of this high court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties." 1 Greenl. Ev. § 248.

There must be found some well-recognized rule of the common law, founded upon common sense and justice, which justifies the exclusion of a voluntary confession of crime. Public policy protects communications between lawyer and client from the eyes of the public, because they are regarded as essential to enable the lawyer to make a proper defense for him. It does not protect confessions or communications where that relation does not exist, no matter how close any other relation between the parties to it may be, or what the purpose may be in making the confession. No sacredness attaches to the confession of a criminal, and, when he seeks protection from its consequences, he must show his privilege to be within some well-recognized rule of law. I do not believe in extending the rule for his protection, but, rather, in restricting it for the protection of the public. Chief Justice Shaw said that the

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communication, to be privileged, must be "with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties, and obligations, whether with a view to the prosecution or defense of a suit, or other lawful object. * * *

"This principle we take to be this: That so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed. To the rule as thus stated we are still inclined to adhere.

"But the privilege of exemption from testifying to facts actually known to the witness is in contravention to the general rules of law. It is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. *It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other, as an interpreter, agent, or attorney's clerk. And this privilege is confined to counsel, solicitors, and attorneys, when applied to as such, and when acting in that capacity. Wilson* v. *Rastall*, 4 T. R. 753. * * * And so strictly is the rule held that the privilege extends only to communications made by the client to his attorney for the purpose of obtaining legal advice, that in a late case it was held that a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney if called as a witness in a cause. *Bramwell* v. *Lucas*, 2 Barn. & Cress. 745." *Hatton* v. *Robinson*, 14 Pick. 416 (25 Am. Dec. 415).

As applied to this case, the relation of client and attor-

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ney is the only basis upon which the confession can be held privileged. How can this relation be held to exist in the face of the fact that the respondent knew he was not talking to Judge Person as his lawyer? and most certainly did he know this, when the judge promptly told him that he could not advise him. Not only did the judge plainly tell him this once, but also told him he had better see an attorney; and after respondent said he had seen an attorney, but got no advice from him, etc., the judge again said, emphatically, "I cannot give you any advice as to what you ought to do for your personal benefit;" and after all this the respondent told his story of the crime. I cannot yield my assent to the existence of a relation between this respondent and Judge Person which neither, in my judgment, believed to exist.

I have carefully examined the authorities to find under what circumstances judges are privileged from testifying as to matters which take place before them, and the only privilege I find accorded to them is that, on grounds of public policy, they cannot be called on to state what occurred before them in court. 1 Greenl. Ev. (16th Ed.) § 254c. I find one case which is somewhat in point. *State* v. *Chambers*, 45 La. Ann. 36 (11 South. 944). That case, in its facts, is almost the counterpart of this, except that in that case the judge sought the respondent, while in this the respondent sought the judge. The respondent was charged with the crime of murder. The district judge, before whom he was first tried, visited the respondent in prison, and communicated with him. Upon the second trial, presided over by the judge's successor, he (the judge) was placed upon the stand as a witness. The objection was made, not that the communication was privileged, but that the presence of the judge in his official capacity in the prison intimidated the respondent, so that his answers were not free and voluntary. The court, in disposing of the case, said:

"We find no legal and valid reason to set aside the ver-

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dict on this account. His testimony shows that he warned and cautioned the defendant, and that he conversed freely and voluntarily."

What difference, in principle, does it make whether the judge sought the respondent to obtain, if he could, a confession, or whether the respondent sought the judge to voluntarily make a confession? The only difference between the two cases is that in this case the respondent made the communication after twice being told by the judge that he could give him no advice, while in the other case the respondent made the communication without asking any advice.

The fact that a grand jury was believed to be investigating this crime is of no significance. The same rule would apply if there had been no grand jury, and no suspicion of the crime or of the respondent's guilt. Suppose a case of murder or burglary, and the criminal, for any reason whatever, seeks the presiding judge within whose jurisdiction the crime was committed, and confesses the crime, after being told that he can give him no advice; is the judge's mouth sealed? Should it be sealed? Must a heinous crime go unpunished, under the protection of privileged communications, where no relation of lawyer and client existed or could exist? Would not the judge, under such circumstances, be required, by all considerations of public policy, to disclose the confession?

I do not think there is any error upon the record, and the conviction should be affirmed.

HOOKER, C. J., concurred with GRANT, J.

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HUBBARD v. FREIBERGER.

1. CONTRACTS—PUBLIC POLICY.

An undertaking read substantially as follows: "Return this coupon to A., dealer in buggies, with $15, for which he will deliver to you a book of four of these coupons. Sell these for $3.75 each, thereby getting your $15 back. Each of those to whom you sell a coupon sends to me, purchasing a book for himself. When your four coupons have been sent in, I have received $60, and you will be entitled to $60 worth of merchandise at my store, and it costs you but $3.75 and a few hours' work selling the coupons. The right to redeem all coupons at any time is hereby reserved; and, in case of the exercise of such right, parties holding the same shall be allowed the full value on the purchase price of any article in my establishment. Parties purchasing coupons and being unable to dispose of them will also be allowed face value, less amount paid for first coupon, on the purchase price of anything in my establishment. Coupons will not be redeemable in any other manner than as above specified." *Held*, against public policy.

2. BILLS AND NOTES—CONSIDERATION—VOID CONTRACT.

A contract void as against public policy furnishes no consideration for a promissory note.

3. JUSTICES' COURTS—PLEADING—FAILURE OF CONSIDERATION.

1 Comp. Laws, § 767, relating to pleadings in justices' courts, provides that the plea of the general issue shall be in the same form as in the circuit court, and notice of any defense not admissible under the general issue shall be given with such plea. Sections 769 and 828, relating to the same subject, provide, in substance, that a failure or want of consideration, in whole or in part, may be shown in defense to an action on any contract; the latter section further providing that evidence of a partial failure or want of consideration shall not be admitted unless notice of such defense be given. *Held*, that the defense of a total failure of consideration is admissible under a plea of the general issue, without notice.

Error to Sanilac; Beach, J. Submitted December 2, 1902. (Docket No. 123.) Decided May 12, 1903.

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Assumpsit by Frank W. Hubbard, John Ryan, and Harry A. Simpson, copartners as Frank W. Hubbard & Co., against Paul Freiberger and Jacob Meredith, on a promissory note. From a judgment for plaintiffs on verdict directed by the court, defendants bring error. Reversed.

H. O. Babcock and *J. S. Crandell*, for appellants.

Bope & McNabb, for appellees.

MONTGOMERY, J. This is an action based on a promissory note for $15 given by defendant Paul Freiberger to another. The plaintiffs recovered a verdict by direction of the court. Judgment was entered upon this verdict, and defendants bring error.

The pleading on the part of the defendants was the general issue. On the trial the defendants offered to show that the sole consideration for this note was an engagement or contract given out by the payee, Oscar Auton, which, after reciting that, unless cash was remitted for coupon books, the goods would be held until the notes were paid, proceeded as follows:

"HOW TO OBTAIN A $60 BUGGY FOR $3.75.

"Return this coupon to Oscar Auton, Gagetown, Tuscola county, Michigan, dealer in buggies, wagons, and agricultural implements of all kinds, with $15, for which he will deliver to you a book of four of these coupons. Sell these coupons for $3.75 each, thereby getting your $15 back. Each of those to whom you sell a coupon sends to me, purchasing a book for themselves. When your four coupons have been sent in to me this way, you readily see I have received $60, and you will be entitled to $60 worth of merchandise at my store, and it costs you but $3.75 and a few hours' work selling the coupons.

"The right to redeem all coupons at any time is hereby reserved; and, in case Oscar Auton shall elect to redeem outstanding coupons, parties holding same shall be allowed the full value on the purchase price of any article in my establishment.

"Parties purchasing coupons and being unable to dis-

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pose of them will also be allowed face value, less amount paid for first coupon, on the purchase price of anything in my establishment. Coupons will not be redeemable in any other manner than as above specified."

Defendants also offered to show that the plaintiffs, at the time of purchasing the note, knew of the scheme, and knew that the note in question was procured without consideration. This testimony was objected to on the ground that the pleadings were insufficient to admit the defense without special notice.

This presents the question, first, as to whether this undertaking of Auton is against public policy. We are constrained to hold that it is. It is somewhat similar to the Bohemian Oats scheme, the workings of which are described in *McNamara* v. *Gargett*, 68 Mich. 454 (36 N. W. 218, 13 Am. St. Rep. 355). It is a scheme which, upon its face, shows that it cannot be worked out without ultimately leaving parties with these so-called coupons on their hands, possessing no value, and is well calculated to deceive ignorant people. This engagement of Auton, furnishing as it does the only consideration for this note, and being in itself against public policy, is as though no contract existed, and furnishes no consideration whatever. Clark, Cont. pp. 414, 440.

The statute relating to pleadings in justice's court (1 Comp. Laws, § 767) provides that:

"The pleadings in a suit before a justice of the peace may be either written or verbal, at the discretion of the party making the same, except in case of notice of title to land; when written, they shall be filed with the justice; when verbal, the justice shall enter in his docket the substance thereof; the declaration shall be sufficient on general demurrer if conformable at the time to the rules of pleading applicable to the circuit court; the plea of the general issue shall be in the same form as in those courts, and notice of any defense not admissible under the general issue shall be given with such plea; no special demurrer shall be allowed; pleas in abatement must be pleaded under oath, and the execution of a written instrument, filed with the justice, shall not be denied except under oath, as hereinafter provided."

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Under this section, the general rules of pleading obtaining in the circuit court govern the practice in justices' courts, except in so far as the statute relating to justices' courts pleadings otherwise provides. But under the same title, "Of Pleadings and Set-Offs," it is enacted by section 769 as follows:

"A failure or want of consideration, in whole or in part, may be shown in defense to any action or set-off upon or arising out of any bond or promissory note or other instrument in writing, except negotiable notes, negotiated before falling due to any person not having at the time it was negotiated knowledge of such defense."

Under the title "Trial of Causes" it is provided by section 828 that:

"A failure or want of consideration, in whole or in part, may be given in evidence in any action or set-off upon or arising out of any contract, except negotiable instruments, negotiated before they became due to persons not having notice of such defense; in actions upon such contracts, evidence of a partial failure or want of consideration shall not be admitted, unless notice of such defense shall be given."

These two sections make very clear the legislative intent that the defense of a total failure of consideration should be admitted under a plea of the general issue and without notice.

The court was, therefore, in error in excluding this defense, and the judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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GORDON v. LANSING STATE SAVINGS BANK.

1. CHECKS—VALIDITY—WANT OF PAYEE.
   The holding of the circuit judge, to the effect that a check payable to "the order of ————," a line being drawn through the space provided for the name of the payee, is not payable to bearer, or to an impersonal payee, but is void for want of a payee, precluding the bank from charging the drawer with the amount paid thereon, was sustained by a divided court; CARPENTER and GRANT, JJ., being of the contrary opinion, and MONTGOMERY, J., not sitting.
2. SAME—ABSENCE OF DATE.
   A date is not essential to the validity of a check. Per CARPENTER and GRANT, JJ.

Error to Ingham; Wiest, J. Submitted December 2, 1902. (Docket No. 125.) Decided May 12, 1903.

Assumpsit by John R. Gordon against the Lansing State Savings Bank to recover the balance of a deposit. From a judgment for plaintiff, defendant brings error. Affirmed.

Charles F. Hammond, for appellant.

Russell C. Ostrander, for appellee.

MOORE, J. This case was tried by the circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

"Monday morning, December 9, 1901, at about 9 o'clock, there was presented at the bank of defendant at the city of Lansing for payment the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

"'LANSING, MICH., ... 190.. No. .....

"'LANSING STATE SAVINGS BANK OF LANSING.

"'Pay to the order of ..... Nine Hundred and Seventy Dollars. $970.00.

"'JNO. R. GORDON.'"

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"The check was indorsed by Charles P. Downey, and was presented by an employé of Mr. Downey, and cash was paid at the time of its presentation.

"The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was $3.40, but during the day $2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for $970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept that check as a voucher for the money paid.

"December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for $970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank."

The circuit judge rendered a judgment in favor of the plaintiff for $970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: *First*, the effect of not dating the check; *second*, has the check a payee? We do not deem it necessary to discuss the first question. As to the second question, it will be noticed the drawer of the check did not name a payee therein, nor did he leave a blank space where the name of a payee might be inserted, nor did he name an impersonal payee. In the case of *McIntosh* v. *Lytle*, 26 Minn. 336 (3 N. W. 983), the court used the following language:

"A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable, and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement,—that is, that it shall be payable to bearer. So, when a bill, note, or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name

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in the blank space as payee, and a *bona fide* holder may then recover on it.

"These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a *bona fide* holder, to have had authority to insert a name as payee. In the former cases the instrument is, when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose,—to fix the time of payment,—and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted."

See, also, *Rush* v. *Haggard*, 68 Tex. 674 (5 S. W. 683); *Prewitt* v. *Chapman*, 6 Ala. 86; *Brown* v. *Gilman*, 13 Mass. 160; *Rich* v. *Starbuck*, 51 Ind. 87; Norton, Bills & N. (3d Ed.) p. 59, and notes; 1 Daniel, Neg. Inst. § 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to *Crutchly* v. *Mann*, 5 Taunt. 529. In this case the bill of exchange was made payable to the order of..... The court found that, under the facts shown, the conclusion was irresistible that the name was filled in with the consent of the drawer. The same case was previously reported in 2 Maule & S. 90 (*Cruchley* v. *Clarance*), where, as the case then stood, it appeared the bill of exchange had been

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sent out, the defendant leaving a blank for the name of the payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a *bona fide* holder to insert the name.

In the case of *Harding* v. *State*, 54 Ind. 359, a promissory note was drawn, leaving a blank space for the name of the payee; and it was held:

" 'So the name of the payee may be left blank, and this will authorize any *bona fide* holder to insert his own name.' 1 Pars. Notes & B. 33."

In the case of *Brummel* v. *Enders*, 18 Grat. 873, promissory notes, blank as to the names of the payees, had been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers. At the time of the sale the names of the purchasers were inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued, the makers pleaded usury. The court, following the cases already cited, held that any *bona fide* holder of a bill or note which is blank as to the name of the payee may insert his own name, and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated, not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more; he drew a line through the blank space, making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee, but intended to make it impossible for any one else to do so. Had Mr. Gordon issued a check otherwise per-

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fect, but with the blank space for the amount of the check unfilled, and delivered it to a third person, it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank, filled it by drawing a line through it, would any one say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it be presumed there was an impersonal payee when the maker has not made the check payable to cash, or some other impersonal payee? In order to construe the check as a complete instrument, we must read into it an intention not only not expressed by its language, but contrary to the act of the maker. The check, as it appears today, is without any payee. The record is silent in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a *bona fide* holder.

Judgment is affirmed.

HOOKER, C. J., concurred with MOORE, J.

CARPENTER, J. I regret that I cannot concur in the opinion of my Brother MOORE. I agree with him that the check in question is not governed by the authorities which hold that, where a blank is left for the insertion of the name of a payee, the instrument is to be treated as payable to bearer. I cannot agree, however, that the case of *McIntosh* v. *Lytle*, 26 Minn. 336 (3 N. W. 983), is controlling. That case resembles this in many particulars. There is, however, a difference which, in my judgment, renders the reasoning of that case inapplicable. The fact that the plaintiff in the case at bar used the ordinary blank, and drew a line through the space intended for the name of the payee, prevents our assuming, as did the court there,—and its decision was based on this assumption,—that it is "the case of an inadvertent failure to complete the instrument intended by the parties." The

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instrument under consideration is obviously complete, in just the form the maker intended.

In my judgment, the authorities which hold a check payable to the order of an impersonal payee to be valid and negotiable control this case. I quote from the case of *Willets* v. *Bank*, 2 Duer, at page 129:

"One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. *Vere* v. *Lewis*, 3 Term R. 183; *Minet* v. *Gibson*, Id. 481; *Gibson* v. *Minet*, 1 H. Black. 569, affirmed in the house of lords. And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud."

In *Mechanics' Bank* v. *Straiton*, 3 Abb. Dec. 269, a check payable to bills payable or order was held payable to bearer, the court saying:

"By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement,—*i. e.*, in the same manner as if it had been made payable to bearer."

We must decide that the check in the case at bar, like those in the cases cited, is either altogether void, or is transferable by delivery. I submit that we should follow

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those cases, and decide that it is transferable by delivery. To quote the language of Lord Ellenborough, in *Cruchley* v. *Clarance*, 2 Maule & S. 90:

"As the defendant has chosen to send the bill [check] into the world in this form, the world ought not to be deceived by his acts."

This view of the case compels me to notice the fact that the check under consideration is not dated. According to the weight of authority, this omission does not invalidate it. See Zane, Banks, § 152; 2 Daniel, Neg. Inst. § 1577; Norton, Bills & N. (3d Ed.) p. 405, note.

I think the judgment of the court below should be reversed, and a judgment entered in this court for the defendant.

GRANT, J., concurred with CARPENTER, J.

MONTGOMERY, J., did not sit.

FINCH v. VILLAGE OF BANGOR.

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1. MUNICIPAL CORPORATIONS — NEGLIGENCE — DEFECTIVE HIGHWAYS—QUESTION FOR JURY.

   Where plaintiff was injured by falling over a loose board that had been placed in the gutter a few hours previously by the agents of defendant village while constructing a sidewalk, it was for the jury to say whether there was negligence in thus disposing of the material, or whether the street was in a reasonably safe condition for public travel under the circumstances.

2. SAME—CONTRIBUTORY NEGLIGENCE.

   The fact that plaintiff left the sidewalk line, in the darkness, some 15 feet from a cross-walk, and attempted to go thereto diagonally, with knowledge of the progressing repairs, did not conclusively show contributory negligence.

Error to Van Buren; Carr, J. Submitted December 2, 1902. (Docket No. 136.) Decided May 12, 1903.

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Case by Louisa Finch against the village of Bangor for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Lynn J. Lewis and *Gore & Harvey*, for appellant.

Kelley & Chase and *T. J. Cavanaugh*, for appellee.

HOOKER, C. J. The plaintiff recovered a small judgment against the defendant in an action for damages arising from a personal injury. The village authorities were engaged in constructing a sidewalk, and some of the old planks were piled in the street after being taken up. The accident occurred near a street corner. Instead of going to the cross-walk, the plaintiff stepped from the sidewalk bed over the curb into the gutter, about 10 or 15 feet from the cross-walk, with the apparent intention of going diagonally to the cross-walk. She claims to have stumbled over a board and fallen, and the jury were permitted to find that, although she did not see any board, because of the darkness, there was a board there, and that it was one of the boards formerly a part of the old walk, and that it was thrown in the street by those doing the work for the village, and that she fell by reason of stumbling over it.

It is contended:

1. That the declaration does not state a cause of action, because: (*a*) It does not allege a defect in the street itself; (*b*) it shows a want of liability, because it is not actionable for a village to leave a loose board in a gutter overnight; (*c*) it fails to show that the defendant had a reasonable time and opportunity to put the street in proper condition after knowledge of its being unfit for travel.

2. That a verdict for the defendant should have been directed for the reason that there is no proof of negligence, inasmuch as no one is shown to have seen the board either before or after the accident.

3. The want of repair was not the immediate cause of the injury.

4. Want of knowledge on defendant's part of the existence of the defect.

5. Plaintiff was guilty of contributory negligence.

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We are of the opinion that there is testimony in the case from which it may be inferred that the plaintiff fell over a board, and that it was placed in the gutter by the agents of the village, which therefore had notice; and while it may not have been negligent for the village, in making its repairs, to place such material in the highway in a reasonable manner and place, and leave it there a reasonable time, having in view its obligation to the public and its protection, it was for the jury to determine whether the plaintiff was injured in the way she states, whether it was reasonable or negligent for the village to so dispose of the material, and whether the plaintiff was negligent in crossing the street at the place and time, in the manner adopted, and under the circumstances. It would be proper for a jury to consider all of these things, and had they found that the defendant had a right to expect more care from the plaintiff, and the plaintiff entitled to less care than in ordinary cases on the part of the village on such an occasion, by reason of the known character and exigencies of the improvement, it would have been within their province. Perhaps they did so find, but that nevertheless the village was unnecessarily lax, while the plaintiff was using all of the care ordinarily used under the increased hazard of such conditions. We cannot say that they did not, or that the street was kept in a reasonably safe condition for public travel *under the circumstances*, which was all that plaintiff had a right to demand. It was for them to judge whether the highway was in such a condition as to require the erection of barriers or the exclusion of the public. See *Southwell* v. *City of Detroit*, 74 Mich. 438 (42 N. W. 118). The duty extends to keeping highways in a condition reasonably safe and fit for travel. See *Hayes* v. *City of West Bay City*, 91 Mich. 418 (51 N. W. 1067); *Joslyn* v. *City of Detroit*, 74 Mich. 460 (42 N. W. 50); *Malloy* v. *Township of Walker*, 77 Mich. 461 (43 N. W. 1012, 6 L. R. A. 695); *Fuller* v. *City of Jackson*, 82 Mich. 481, 484 (46 N. W. 721); *Wakeham* v. *Township of St. Clair*, 91 Mich. 23 (51 N. W. 696).

The judgment is affirmed.

The other Justices concurred.

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NOE *v.* RAPID RAILWAY CO.

1. STREET RAILWAYS — INJURY TO EMPLOYÉ — NEGLIGENCE — FELLOW-SERVANTS.

   An employé of an electric railway company, who, while returning from work on one of its cars, was injured through the negligence of the company in not providing a safe system for operating its road, is not precluded from recovery by the fact that the car was in charge of a fellow-servant.

2. SAME — ASSUMPTION OF RISK.

   An employé of an electric railway company, who was furnished with transportation on the company's cars in going to and returning from work, did not assume the risk of defective appliances in connection with the track over which he rode, as his work was performed at a distance therefrom, and he had no duty calling his attention thereto.

3. SAME — SAFETY DEVICES — UNLOCKED SWITCHES.

   An electric railway company is not relieved from the obligation to equip its switches with locks by the fact that such companies generally make no such provision, if common prudence would suggest the adoption of the custom of steam roads in that particular. HOOKER, C. J., and GRANT, J., dissenting.

4. SAME — TARGETS AND LIGHTS.

   But whether such companies should be held to the duty of maintaining targets or signal lights in the public highways,— *quære.*

5. SAME — EXCESSIVE SPEED OF CAR.

   Negligence may be predicated upon the failure of an electric railway company to require its cars to be slowed down on approaching a switch which was unprovided with a lock, target, or light, though the misplacing of the switch was the only danger to be apprehended. HOOKER, C. J., and GRANT, J., dissenting.

6. SAME — PROXIMATE CAUSE.

   It cannot be said that the negligence of an electric railway company in not providing a lock for one of its switches was not the proximate cause of an injury occasioned by the throwing of the switch by a trespasser. HOOKER, C. J., and GRANT, J., dissenting.

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Error to Macomb; Law, J., presiding. Submitted January 7, 1903. (Docket No. 7.) Decided May 12, 1903.

Case by Frank Noe against the Rapid Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Byron R. Erskine (*Gray & Gray*, of counsel), for appellant.

Clark, Durfee & Allor, for appellee.

MONTGOMERY, J. The plaintiff, who was an employé of the defendant company, recovered judgment against it in the Macomb circuit court for injuries received by him on January 7, 1900, by reason of a car on which he was being transported running into a switch which had been opened by the act of a third person. The defendant has brought error to this court, claiming that, from the undisputed testimony, a verdict should have been directed in its favor.

The defendant is organized under the general street-railway law of this State, and owns and operates a street railway along the Gratiot road between Detroit and Mt. Clemens, which railway is 15¼ miles in length. At the time of the accident, defendant's power house and barn was located in the township of Erin, Macomb county, about 7½ miles south of Mt. Clemens, and about 50 feet from the main track. Cars were operated in and out of this structure on switches connecting with the main line. At this time the defendant company had been constructing an addition to its power house and barn, and the plaintiff and several other laborers were engaged in the work. Plaintiff received 40 cents an hour for his services, and, in addition thereto, was transported to and from his work; his home being in Mt. Clemens; he riding on one of the company's regular employé passes.

On January 7, 1900, plaintiff and his colaborers had completed their work on the building. They had been

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accustomed to take the car leaving the power house at 4:50 p. m., but on the night in question, in order to finish up, they worked later, and took the next car, which left Detroit at 4:30, and arrived at the power house at 5:20 p. m. This car was on time. These cars were run according to a printed schedule, and were under the control of a train dispatcher, whose office was in Mt. Clemens. Regular meeting points were established along the line, and booths were constructed at these and other points, which were in telephonic communication with the dispatcher, who kept a daily record of the movements of the several cars. The cars going in opposite directions, when on time, would pass at regular meeting points, designated on the time-table. When late, they reported to the dispatcher, who designated the meeting point.

The car which plaintiff took at the power house proceeded towards Mt. Clemens. It met the south-bound car at switch No. 4, the regular meeting point, located some 2½ miles from the power house. It was delayed at this switch only about half a minute, and then proceeded on towards Mt. Clemens at the usual rate of speed. About half a mile from switch No. 4, and towards Mt. Clemens, was the gravel-pit switch,—so called because originally a spur had been constructed from this point to a gravel pit about a mile east of the main track. When the gravel pit had been exhausted, the spur track had been moved, except a stretch about 200 feet long, which could be used as a switch or siding for the passing of cars if for any reason a car was late and could not make the regular meeting point. To enter this spur switch, it had to be approached from the south. If a south-bound car desired to run into the switch, it would be necessary to run south of the switch points, throw the switch, change the trolley onto the switch overhead wire, which was independent, throw the current onto this wire, which was controlled by a switch on a post, and then back up.

On the evening in question, the south-bound car had passed over this switch about 1½ minutes before it met

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plaintiff's car at switch No. 4. At the time, the gravel-pit switch was properly set for the main line. About 3 minutes thereafter, plaintiff's car, going north at the usual rate of speed, was wrecked at this switch; the same having been thrown open during this short interval. While sufficient evidence was not obtainable to justify apprehending any one, the fact that the switch was thrown open by human agency is not contradicted. It is an open question whether the act of throwing this switch was that of a malicious person or the act of children. The switch was not locked, nor was it provided with a light or target. The negligence charged is failure to have a light or target at the switch, failure to keep the switch locked, and failure to provide for slowing up the car at this point. Plaintiff recovered, and defendant brings error. Error is assigned simply upon the ground that the verdict should have been directed for defendant.

It is contended that the plaintiff was a fellow-servant of the motorman. If this be conceded, the result is not necessarily nonliability. True, the plaintiff would in such case be held to have assumed the risk of negligence of co-employés; but, according to plaintiff's theory, and upon the proofs, it cannot be said that the motorman's negligence was the cause of the injury. The fault, if any, was in not providing a safe system in running the cars, as the motorman was quite within his orders in running the train at full speed in disregard of this switch. The fault, then, if there was a fault, was the fault of the master, the company.

It is said the plaintiff also assumed the risk of these appliances, and the case of *Ragon* v. *Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336), is cited in support of this contention. In the present case, however, the plaintiff had no duty which would bring to his attention the defects complained of. His work was performed at a distance from this switch, and no notice of the defects would come to him through his work, as his duties had no relation to the track. He simply rode over the track, as did any other passenger.

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Defendant's counsel further contend that the testimony shows that targets, lights, and locks are not used on street or electric railway lines, and that, if the defendant has shown that the company observed the same care that other electric railways have exercised, this must be held to be due care. If we assume that it is not negligent to conduct a business in the usual manner (as to which see *Grand Rapids, etc., R. Co.* v. *Judson*, 34 Mich. 507), it remains to consider what shall furnish the standard. Can the defendant company neglect precautions which are taken by steam railroads against the same character of disaster as the defendant is called upon to guard against? We think not. It can make no difference whether the force which propels a car freighted with human beings, and going at a rate of 35 or 40 miles an hour, is one power or another. A misplaced switch is as sure to result in serious damage in one case as in the other. The question, more properly, is, What has human foresight provided as a safeguard against such a disaster? And common prudence would suggest an investigation into the methods of such a business as involved such contingencies as confront the operating company.

It is further contended that the failure to provide lights or locks cannot be said to be the proximate cause of the injury to plaintiff. We are not able to distinguish this case, as respects this question, from the case of *Town* v. *Railroad Co.*, 84 Mich. 214 (47 N. W. 665). See, also, *Birmingham Railway & Electric Co.* v. *Allen*, 99 Ala. 359 (13 South. 8, 20 L. R. A. 457).

Finding, as we do, that there was a case for the jury, the judgment is affirmed.

MOORE, J., concurred with MONTGOMERY, J.

CARPENTER, J. (*concurring*). I doubt the right of the jury to find that a street-railway company is under an obligation to place a target or light, which may possibly be an obstruction to travel, in the public highway. I

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agree, however, that the judgment should be affirmed, for the other reasons stated in the opinion of Justice MONTGOMERY.

HOOKER, C. J. (*dissenting*). The defendant is a suburban railway company, and its road is a trolley road constructed along a highway. The plaintiff, a mason, was employed in constructing an addition to its power house, for which he received, as compensation, 40 cents an hour for the time that he worked, and free transportation by defendant's cars to and from his home, some miles away from the place where he worked. He was injured by reason of the derailment of a car near a switch, and recovered a judgment, upon which the defendant has brought error.

The plaintiff's claim is that his car was derailed, by reason of a misplaced switch, but a few minutes after a car had crossed the switch, when it was properly set. It appears to be conceded that it was changed by human agency, and was the work of a trespasser,—possibly children. Defendant claims that it was done by an adult, who did it from malicious motives, with an intent to wreck a car. This is not clearly proved. The switch was operated by a bar, heavily weighted, made to lie flat upon the ground, thereby offering no obstruction in the highway. It was an improved device, in common use upon such railways, and there is no proof indicating that a better or safer switch is in common use by roads of this character. It was not locked, nor was there any provision for switch lights; and it is manifest that there could not be lights without having something in the nature of an obstruction in the highway. There was no evidence that locks or lights upon switches or targets were in use by any street trolley road in the country.

The negligence complained of is:

1. Not keeping the gravel-pit switch closed.
2. Not having it locked or securely fastened.
3. Not keeping a light or signal at the switch, such as

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would have indicated to a motorman whether the switch was open or closed.

4. Not running its car more slowly and with greater caution when approaching the switch.

The first three grounds may be considered together, and the question is reduced to the proposition that the railway company may be found guilty of negligence in these particulars notwithstanding its adoption of appliances in general use. The defendant cannot be said to be guilty of negligence for any of these supposed omissions. The only theories upon which it can be said, broadly, that it was negligent in not keeping its switch closed, are (1) that it was an insurer; and (2) that it omitted some duty in the way of measures which would have prevented its being opened. It cannot be claimed that it was an insurer, and counsel do not point out what measure it should have taken, except locking the switch,—and this is speculative,—as against a trespass. But the duty of locking the switch, like that of maintaining a switch light or a target, is one which depends on good railroading, which is a question of custom, and not one of opinion. In the case of *Michigan Cent. R. Co.* v. *Coleman*, 28 Mich. 449, it was said:

"The language used would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is neither more nor less than a failure of duty. All railroad companies are held to the duty of being prudent railroad companies, and bound to conduct their business with such precautions as prudence has usually found necessary. As compared with the care needed in business involving no possible human risk, the care to be used may be properly enough called extraordinary; but, as compared with each other, all such companies have the same duty."

In *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 546 (31 Am. Rep. 321), it was said:

"If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is gen-

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erally found and believed to be safe and prudent, they do all that is incumbent upon them."

Again, in *Werbowlsky* v. *Railway Co.*, 86 Mich. 239 (48 N. W. 1097, 24 Am. St. Rep. 120), it was said:

"The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence."

There is no doubt of the efficacy of the switch used, under ordinary circumstances and conditions. The plaintiff's theory is that provision should be made for extraordinary ones; *e. g.*, he says that, had the switch been locked, it would not have been so easily misplaced, and, had the switch been a different one, provided with lights, the danger might have been discovered by the motorman in season for him to have stopped the car or reduced its speed. There is some truth in these claims, but it is easy for courts and juries to say, after an accident, that this or that might have prevented it. But courts and juries cannot prescribe methods; they can only apply the legal tests to those in operation, and that is the test of experience and custom. It is suggested (though this is not proved) that steam roads usually lock their switches, and use switch lights and targets, and we are asked to say that the duties of electric road companies should be measured by the methods of the steam road companies. It is undoubtedly true that the danger to be apprehended from the derailment of an electric car may be substantially the same as that from the derailment of a steam car running at the same rate of speed; but does it follow that a court or jury can say that the methods of the steam road must be taken as the standard of the electric road? There are other factors in the problem. A steam road is on a private right of way. Electric roads are frequently built in highways, where they must be driven over by persons using ordinary road conveyances and horses. Whether an upright switch, with a light upon it, would be practicable, may be doubtful; and this cannot be determined to be practicable by courts and juries, as against the settled practice of such

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roads. In this connection, see *Bennett* v. *Railroad Co.*, 163 N. Y. 1 (57 N. E. 79).

Another question relates to the rate of speed. It is contended that it was the duty of this motorman to diminish the speed as he approached this switch. If this is so, it must be for the reason that he should have guarded against the danger of a misplaced switch, for the evidence is undisputed that the switch itself offered no impediment to ordinary speed, or additional hazard, if not misplaced. There is evidence in the case that the motorman was directed not to check his speed at switches. In other words, he was required not to have his car so under control that he could certainly avoid accident if the switch should be misplaced. This testimony places upon the defendant the responsibility, if the testimony is believed; and the case is brought to the narrow point whether, with such appliances as are ordinarily used, the defendant was in duty bound to anticipate misplaced switches, and slow down its cars sufficiently to prevent accident from such cause. We cannot say, as a matter of law, that every railway train or car, steam or electric, must, on approaching a switch, be brought down to a rate of speed which will enable the driver to stop in time to avoid accident if it shall be found to be misplaced; nor can a jury be permitted to so find, when it is undisputed that such is not the prevailing practice. The testimony shows that this car was running at the ordinary speed, and that it was entirely safe to cross the switch at that rate of speed, and there is no testimony showing that it is not customary to depend upon unlocked switches, or that they have proven unsafe. In this case it is claimed, though not proved, that there was danger to the car if run at an ordinary rate of speed around that particular curve; but the same rule that would make it a duty to slow up, lest, through a misplaced switch, the car should run on a dangerous track, would impose the same duty on approaching any switch, lest there be a car upon it, with which there would be danger of a collision should the switch prove to be misplaced, and

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the same rule would apply to every steam road in the country, thus putting an end to rapid transit.

The steam roads have their appliances and methods. They may be, in a given case, negligent, but not where they are up to the standard of good railroading. It is contended, if not admitted, that this switch was misplaced by a trespasser, and, on the other hand, it is said that there are concurring causes, viz., the absence of the lock and light, and the failure to check the car. We have no inclination to minimize the rule that requires a carrier of passengers to do all that human care, vigilance, and foresight can do under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. This rule has its limitations, and, as said by the supreme court of Maine in *Libby* v. *Railroad Co.*, 85 Me. 34 (26 Atl. 943, 20 L. R. A. 812),—

" 'It must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining.' *Tuller* v. *Talbot*, 23 Ill. 357 (76 Am. Dec. 695). * * * The test of liability is not whether the company used such particular foresight as is evident, after the accident happened, might have averted it had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used, under apparent circumstances of the case, to prevent the accident, without reasonable knowledge that it was likely to occur. 'In such a case it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event.' *Cornman* v. *Railway Co.*, 4 Hurl. & N. 781, 786."

See, also, *Fox* v. *Mayor, etc., of New York*, 70 Hun, 182 (24 N. Y. Supp. 43); *Bowen* v. *Railroad Co.*, 18 N. Y. 408 (72 Am. Dec. 529); *Stierle* v. *Railway Co.*, 156 N. Y. 70, 684 (50 N. E. 419, 834); *Ayers* v. *Railway Co.*, 156 N. Y. 104 (50 N. E. 960); *Jones* v. *Railway Co.*, 45 U. C. Q. B. 193.

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A railroad need not anticipate a crime nor a trespass, unless there is something in the circumstances surrounding the transaction which should have directed the attention of its officers to the probability of such a danger. *Harris* v. *Railroad Co.*, 13 Fed. 591; *Worth* v. *Railway Co.*, 51 Fed. 171; *Keeley* v. *Railway Co.*, 47 How. Prac. 260; *Latch* v. *Railway Co.*, 3 Hurl. & N. 930; *Deyo* v. *Railroad Co.*, 34 N. Y. 9, 18 (88 Am. Dec. 418); *Fredericks* v. *Railroad*, 157 Pa. St. 103 (27 Atl. 689, 22 L. R. A. 310); *Curtis* v. *Railroad Co.*, 18 N. Y. 534 (75 Am. Dec. 258); *Bennett* v. *Railroad Co.*, 163 N. Y. 1 (57 N. E. 79); *Whipple* v. *Railroad Co.*, 130 Mich. 460 (90 N. W. 287). The record shows an absence of negligence, and *prima facie* that the accident was due to a malicious trespass, which defendant had no reason to apprehend.

Counsel for the plaintiff rely upon *Town* v. *Railroad Co.*, 84 Mich. 221 (47 N. W. 665), as a case practically like the case before us. It differs in several respects. There the defendant was a steam road. Its settled practice was to use switch lights. It discontinued the use of a switch, and so notified the plaintiff. Afterwards it resumed using it, but neither notified the plaintiff nor restored the light. Had notice been given, and no light been seen upon the switch, we may assume that the plaintiff (the engineer) would have stopped his train. Had the light been in place, it would have shown danger. As it was, he supposed the switch spiked, and acted accordingly. In this case there not only had never been lights and locks upon the switches, but it was shown not to be usual upon such roads.

The question of proximate cause is involved in this case, as will be seen from several of the cases cited. Upon this point see, also, *Davis* v. *Railway Co.*, 93 Wis. 470 (67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935); *Smethurst* v. *Congregational Church*, 2 L. R. A. 695, 696, and note (148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550); *Read* v. *Nichols*, 7 L. R. A. 131, note (118 N. Y. 224, 23 N. E. 468); *Smith* v. *Kanawha County Court*,

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8 L. R. A. 83, 84, note (33 W. Va. 713, 11 S. E. 1); *Smithwick* v. *Hall & Upson Co.*, 12 L. R. A. 280, and note (59 Conn. 261, 21 Atl. 924); *Beall* v. *Township of Athens*, 81 Mich. 536 (45 N. W. 1014); *St. Clair Mineral Springs Co.* v. *City of St. Clair*, 96 Mich. 463 (56 N. W. 18); *Bleil* v. *Railway Co.*, 98 Mich. 228 (57 N. W. 117); *Lambeck* v. *Railroad Co.*, 106 Mich. 512 (64 N. W. 479); *Murphy* v. *Railroad Co.*, 107 Mich. 627 (65 N. W. 753); *Lamotte* v. *Boyce*, 105 Mich. 547 (63 N. W. 517); *Borck* v. *Nut Works*, 111 Mich. 129 (69 N. W. 254); *Kingsley* v. *Township of Bloomingdale*, 109 Mich. 340 (67 N. W. 333); *White* v. *Township of Riley*, 113 Mich. 299 (71 N. W. 502); *Smith* v. *Township of Walker*, 117 Mich. 15 (75 N. W. 141); *Doak* v. *Township of Saginaw*, 119 Mich. 680 (78 N. W. 883); *White* v. *Township of Riley*, 121 Mich. 413 (80 N. W. 124); *Bell* v. *Village of Wayne*, 123 Mich. 386 (82 N. W. 215).

The court should have directed a verdict for the defendant. The judgment should be reversed, and a new trial ordered.

GRANT, J., concurred with HOOKER, C. J.

BAEHR *v.* DOWNEY.

1. TROVER—PARTIES—RIGHT OF POSSESSION—AGENCY.
   The owner of property, by intrusting its possession temporarily to an agent, does not preclude himself from maintaining an action against a third person for its conversion. So *held* where a partnership consigned goods to a member of the firm acting as its traveling salesman, and it was contended that the latter alone could sue.

2. INNKEEPERS—PROPERTY OF GUEST—FORWARDING—CONTRACT—CONSIDERATION.
   The benefit accruing to an innkeeper from his observance of the custom of forwarding letters and packages to departed

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guests constitutes a sufficient consideration for his agreement to comply with such custom in a given case.

3. SAME—AUTHORITY OF CLERK.
The clerk of an inn has authority to bind the innkeeper by an agreement with a departing guest to forward packages received for the latter after his departure.

4. SAME—EXTENT OF LIABILITY.
Where an innkeeper agreed to forward a package which was expected to arrive for a guest after his departure, and the package was delivered to the innkeeper after the departure of the guest, and was never returned or forwarded, the innkeeper was liable as an ordinary bailee.

5. SAME—CONTRIBUTORY NEGLIGENCE.
In such case, the value of the package (*i. e.*, $300) not being such as to require extraordinary precautions, a failure to mark such value on the package, or to notify the innkeeper thereof, was not such contributory negligence as would relieve the latter from liability.

6. BAILMENTS—LIABILITY OF BAILEE—BURDEN OF PROOF.
The liability of a bailee is established *prima facie* by proof of his receipt of the property, and failure to return it on demand; he then having the burden of showing his freedom from negligence.

Case made from Ingham; Wiest, J. Submitted January 13, 1903. (Docket No. 34.) Decided May 12, 1903.

Trover by Herman Baehr and Marcus Loew, copartners as Herman Baehr & Company, against Charles P. Downey and Oscar J. Downey, copartners as H. J. Downey's Sons. There was a judgment for defendants, and plaintiffs assign error. Reversed.

Plaintiffs brought suit to recover the value of certain goods claimed to have been lost at the hotel of the defendants. The case was tried before the court without a jury, and the following are the material facts as found by the court:

The plaintiffs as partners, on the 17th day of October, 1900, were manufacturers of furs in New York City, and the defendants were the proprietors of the Hotel Downey,

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in the city of Lansing. Marcus Loew, one of the plaintiffs, was traveling salesman for the firm, and on the 17th and 18th days of October, 1900, he was a guest at the hotel of defendants. He arrived at the hotel October 17th, and paid his bill and left after lunch on October 18th. At the time of his departure from the hotel, he requested the clerk in the office of the hotel, to whom he paid his bill, to forward any letters or packages that might come for him that day to the Hibbard House, Jackson, Mich., and any letters or packages that might come to him after the day of his departure to him at the Palmer House, Chicago, Ill. The clerk stated to Mr. Loew that he would attend to the forwarding of any mail or packages in accordance with the direction given him. It is a general custom for proprietors of hotels of the class of defendants' to forward mail and packages addressed to those who have been their guests, upon request, to the place designated by such departing guest, and it is a practice for the hotel proprietors to keep a record book in which the directions for forwarding are recorded, and defendants kept such a record.

October 17, 1900, at plaintiffs' place of business in New York City, thirteen cross sable mink scarfs of the value of $117, eight Baum marten scarfs of the value of $168, and one skunk scarf of the value of $5.50, were packed in a strong pasteboard box, wrapped in thick paper, and securely tied with string, and were shipped by plaintiffs by the National Express Company to Mr. Loew, Hotel Downey, Lansing, Mich., express charges prepaid. October 19, 1900, the National Express Company delivered this package at the Hotel Downey, and it was duly receipted for by an employé of defendants. Mr. Loew or the plaintiffs have never received the package so delivered at the hotel of defendants; it has not been received at the Hibbard House, Jackson, or the Palmer House, Chicago; and was never forwarded from defendants' hotel. Plaintiffs made their first demand for said goods on December 12, 1900, and the defendants, on December 18th, acknowledged their inability to find the goods or to produce them.

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Defendants had no personal knowledge of the request of Mr. Loew that the package be forwarded to him, or of its receipt at their hotel, or of what subsequently became of it. No proof of any assignment of any right of action from Mr. Loew to plaintiffs was made. Mr. Loew registered at defendants' hotel as "M. Loew." No valuation was given to the express company when the package was delivered.

Thomas, Cummins & Nichols, for appellants.

Montgomery & Clark, for appellees.

GRANT, J. (*after stating the facts*). 1. The stringent liability of innkeepers for the property of their guests is conceded. The learned circuit judge held that the contract to forward the package was one growing out of and based upon the relation of innkeeper and guest; that the practice of fowarding letters and packages to departed guests induces travelers to stop at a hotel following the custom, and inures to the benefit of the hotel proprietor, and was a sufficient consideration for the defendants' undertaking to forward the parcel. He, however, entered a judgment for the defendants, for the reason that the plaintiffs had parted with their right of possession when they shipped the goods to Mr. Loew, their agent; that Mr. Loew was the one deprived of possession, and not the plaintiffs; and that they could not maintain trover because they had not a conjoint right of possession. In this we think he was in error. It is a matter of common knowledge that traveling salesmen are usually agents, and not principals; that they do not represent themselves, but others; and that the goods they carry with them or receive from their houses are not their goods, but the goods of those they represent. In this case, however, one of the principals was the traveling agent of the firm. The possession of the agent inures to the benefit of the principal, and, whenever that possession is wrongfully interfered with by a third party, it is damage to the principal, and

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not to the agent. Even were the principals undisclosed, and the defendants dealt with the agent as a principal, this would not prevent the real parties in interest from bringing suit in their own names to recover their property, or the damage done to it, or the value when lost. A party is not deprived of the right to pursue his own property although he has temporarily intrusted the possession of it to an agent. The wrong-doer is not in position to defend his own wrongful acts against the rightful owner by saying, "You intrusted the possession to your agent, and I am responsible to him, and not to you." Plaintiffs had made a proper demand for the goods, and, upon the failure of the defendants to produce them, their right of action became complete.

2. The next point urged to defeat recovery is: (1) That the plaintiffs cannot maintain this action, because the contract made with the clerk was not binding upon the defendants; and (2) that the relation of guest and innkeeper had ceased, and that defendants were only gratuitous bailees. The clerk was the authorized agent of the defendants, and his acts towards, and conduct with, guests, bound them, in so far as they were within the duties and liabilities of innkeeper. Mr. Loew had not ceased to be a guest of the hotel when the agreement to forward his letters and packages was made. It was simultaneous with the payment of his bill and notification that he was to leave. Even if the goods had been at the hotel, Mr. Loew would have had a reasonable time to remove them, and the innkeeper's extraordinary liability would remain until the expiration of such reasonable time, which would vary according to circumstances. Wandell, Inns, 102; *Murray* v. *Marshall*, 9 Colo. 482 (13 Pac. 589, 59 Am. Rep. 152); *Maxwell* v. *Gerard*, 84 Hun, 537 (32 N. Y. Supp. 849); *Adams* v. *Clem*, 41 Ga. 65 (5 Am. Rep. 524).

Counsel for the defendants cite several cases holding that innkeepers are not liable after the relation of guest and innkeeper has ceased and the guest has left. Such is the case of *O'Brien* v. *Vaill*, 22 Fla. 627 (1 South. 137,

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1 Am. St. Rep. 219), where the guest paid his bill and left his baggage, saying he would be gone for a few days. So, in *Glenn* v. *Jackson*, 93 Ala. 342 (9 South. 259, 12 L. R. A. 382), the guest had paid his bill and intrusted his baggage to a servant not authorized to receive it. Similar facts and the same holding are found in *Gelley* v. *Clerk*, Cro. Jac. 188; *Hays* v. *Turner*, 23 Iowa, 214; and many other cases.

None of those cases are like this in facts or in principle. Innkeepers and travelers recognize the fact that it is essential to the proper conduct of business that letters and packages to business and traveling men be forwarded. It is a universal practice. Innkeepers keep books in which to enter such directions. The defendants kept a book for that purpose. The language in *Murray* v. *Marshall*, *supra*, recognizes "the increased demand for more extended accommodations in this respect." See, also, *Giles* v. *Fauntleroy*, 13 Md. 126, 136. As the circuit judge held, such contracts are for a valuable consideration. An innkeeper who would not do it would soon be left without custom. The contract is one made with a guest, and not with one who has ceased to be a guest. In *Maxwell* v. *Gerard*, *supra*, the guest, upon leaving the hotel to go on board a yacht for a cruise, arranged with the clerk to deliver his trunk to an expressman for transportation to his residence. It was held that the defendant's liability as innkeeper continued until he delivered the package to the expressman. That case is nearer, in its facts and in the rule enunciated, to this, than any other case cited, and than any we have been able to find. It is no hardship to hold innkeepers to this liability. The defendants, upon the receipt of the package, could at once have returned it to the express office for forwarding. Proper protection for the property of agents and their principals demands that this common-law liability attach until the innkeeper has complied with his contract for forwarding. The contract was within the scope of the clerk's authority. The burden of proof was upon the defendants to show facts

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which would relieve them of their strict liability. They failed to do so.

3. It is next urged that plaintiffs were guilty of contributory negligence in not having the value of the package marked upon it, and in failing to notify the defendants of the contents of the expected package, and that plaintiffs permitted nearly two months to elapse before notifying defendants of the loss. The duty of the defendants was the same, no matter what the value of the package was. It was not of such great value as to require extraordinary precaution in this respect on the part of the plaintiffs. The defendants could at once have relieved themselves of liability by complying with their contract. We need not be understood as holding that there may not be circumstances which require extraordinary precautions on the part of the guest, under the principle recognized in *Smith* v. *Express Co.*, 108 Mich. 572, 578 (66 N. W. 479).

To the other point it is sufficient to say that the record does not disclose that the plaintiffs waited nearly two months. Plaintiffs proved the delivery of the property, the demand, and value, and rested. There is nothing to show that the demand was the first notice that defendants had of the loss of the property.

My Brethren do not agree with me that the strict liability of innkeeper attached to the defendants. They are of the opinion that that relation ceased to exist, and that the defendants were ordinary bailees of the property. Under these circumstances, plaintiffs made out a *prima facie* case by showing the property in the defendants' possession, and refusal or neglect to return on demand. The *onus* of exoneration was then upon the defendants. 3 Am. & Eng. Enc. Law (2d Ed.), 750. The rule as there stated is that, when the chattels are not returned at all, the law presumes negligence, and casts upon the bailee the *onus* of showing he was not negligent. This, undoubtedly, is the more modern and reasonable rule. See, also, *Knights* v. *Piella*, 111 Mich. 9, 14 (69 N. W. 92, 66 Am. St. Rep. 375); *Donlin* v. *McQuade*, 61 Mich. 275 (28 N. W. 114).

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Inasmuch as defendants made no showing upon this point, the judgment must be reversed, and entered here for plaintiffs. Upon all the other points my Brethren agree with me.

Judgment reversed, and entered in this court for plaintiffs, with costs of both courts.

The other Justices concurred.

SECCOMBE *v.* DETROIT ELECTRIC RAILWAY.

1. STREET RAILWAYS — INJURY TO EMPLOYÉ — COLLISION — PROXIMATE CAUSE.

   Where plaintiff, a street-railway motorman, was injured by a collision with a car which was being backed on the same track on which his car was being operated, for the purpose of obtaining relief for a car which had been derailed by reason of a defect in the track some distance ahead, the defect in the track was not the proximate cause of the injury.

2. SAME — BACKING CARS — RULES — SUFFICIENCY.

   Where a street-railway company had promulgated a rule that cars should not be started backward until the motorman should receive three bells from the conductor, who should remain on the rear platform while the car was moving backward, the failure of the company to adopt other rules regulating the running of cars backward was not negligence justifying a recovery for injuries to a motorman in collision with a backing car; it not appearing that other or different rules were in use on other roads, regulating such operation of cars.

3. SAME — ASSUMPTION OF RISK.

   Where a street-railway motorman knew that cars were operated backward, on some occasions, without red lanterns being carried on the rear thereof, and that the company had not established telephone connections to warn following cars of a car being operated backward, he assumed the risk of the operation of such cars without such precautions.

4. SAME — NEGLIGENCE OF CONDUCTOR.

   Negligence cannot be predicated upon the act of the conductor

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of an electric car in jumping therefrom to escape an impending collision, after he has signaled the motorman to stop, and done all that he can to avert the accident.

5. MASTER AND SERVANT — INJURY TO EMPLOYÉ — INCOMPETENT SERVANTS—BURDEN OF PROOF.

Before a master can be held liable for injuries to an employé on the ground that he had in his employ an incompetent servant, it must appear that he had been negligent either in employing or retaining such servant, and the burden of proof is upon the plaintiff.

6. SAME—STREET RAILWAYS—INCOMPETENCY OF CONDUCTOR—EVIDENCE.

In an action against a street-railway company for injuries to an employé, alleged to have been due to the incompetency of a conductor in its employ, witnesses testified that the conductor was slow in ringing bells, and was liable to get excited and give wrong signals; that his reputation for competency was "not the best;" that he was short, and had to stand on tiptoe to reach the bell cord, which made him slow in emergencies; but none of the witnesses had ever heard of his having an accident, or reported him as incompetent to the company or the "union." *Held*, insufficient to raise a presumption that defendant knew or ought to have known of his alleged incompetency, or to show that it should have removed him had it known all the facts testified to.

Error to Wayne; Donovan, J. Submitted December 3, 1902. (Docket No. 140.) Decided May 12, 1903.

Case by Frederick W. Seccombe against the Detroit Electric Railway for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Thomas Kissane and *Lehmann & Riggs*, for appellant.

Corliss, Andrus, Leete & Joslyn, for appellee.

HOOKER, C. J. The plaintiff was a motorman on defendant's railroad. He was injured by reason of his car coming into collision with another car which was backing up. At the point of collision there were two

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tracks, and cars were not expected to run both ways upon either. It is claimed that the reason for it on this occasion was the derailment of a third car at a point about a mile or more distant from the place of the collision, where there was a switch, and a worn rail, which had on two or more previous occasions caused the defendant's cars to leave the track. The court directed a verdict for the defendant, and the plaintiff has appealed.

The negligence alleged and relied upon appears to be:

1. That Drouillard, the conductor, and the motorman of the car which was being run backward were incompetent.
2. That the track was in bad condition, and therefore caused cars to be derailed at the switch, thus making it necessary to back the next car to another switch.
3. That defendant neglected to provide and furnish rules by which its servants could operate its cars with safety when backing up.

At defendant's car barn there was a switch, by means of which a car might pass from one track to the other. The next such switch was a mile or more distant, and it was at the last-mentioned switch that the car was derailed. Plaintiff says that this derailment was due to a worn rail, and that such derailments had occurred there before, and on such occasions the next car would have to back up to the car barn before it could be switched upon the return track. On two or three occasions the plaintiff had known of the cars being backed to the barn, and he had done so with his car. On this occasion he passed the barn at 8 o'clock in the evening, and the collision occurred a little later, when he met the preceding car backing up. The trolley wires were supported by posts set between the tracks, and defendant's counsel contend that, had not the two cars been upon the same track, these poles would have intercepted plaintiff's line of vision to the other car, not otherwise, and that this should have been notice to him, the failure to observe and heed which was contributory negligence in him. No testimony was introduced by the defendant.

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On the night of the accident, the car second in advance of plaintiff's car ran off the track, and made an obstruction. The next car to arrive was in charge of Drouillard, as conductor, and Clixby, as motorman; and they were asked to carry word to the barn, a distance of a mile and a half, to send relief. There was no way to do this but to back the car to that place, which they proceeded to do. The alleged defect was that there was a worn rail or point of a switch at the Y, which on some occasions had derailed the cars. The worn rail was not the proximate cause of the injury, if it was a remote one. *New York, etc., R. Co.* v. *Perriguey*, 138 Ind. 416 (34 N. E. 233, 37 N. E. 976); *Jackson* v. *Railway*, 13 Lea, 492 (49 Am. Rep. 663); *Fawcett* v. *Railway Co.*, 24 W. Va. 760; *De Camp* v. *Sioux City*, 74 Iowa, 392 (37 N. W. 971); *Kistner* v. *City of Indianapolis*, 100 Ind. 211; *Lewis* v. *Railway Co.*, 54 Mich. 55 (19 N. W. 744, 52 Am. Rep. 790); *Selleck* v. *Railway Co.*, 58 Mich. 199 (24 N. W. 774). See, also, cases cited in opinion in case of *Noe* v. *Railway Co.*, *ante*, 162 (94 N. W. 747).

We are asked to hold that it should have been left to the jury to say whether this accident was not due to the want of some reasonable and necessary rule for the backing of cars. The record shows that a printed rule required that "motormen must not start their cars until receiving either two bells or the word 'Right' from the conductor, nor start the car backward before receiving three bells from the conductor, who must remain on rear platform while car is moving backward." We are not advised that any other or different rule is in use on any street railway in the country. Counsel suggest that the company should have established telephone connection with the Y, or should have required red lights on the rear of cars.

It requires more than the production of authorities asserting that it is the duty of railroads to promulgate reasonable rules for the running of trains to establish the fact that a defendant has been negligent in that respect. In *Niles* v. *Railroad Co.*, 43 N. Y. Supp. 751, it was said:

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"The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which was not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employés and passengers, * * * these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty in not being able to foresee certain contingencies."

And in the case of *Berrigan* v. *Railroad Co.*, 131 N. Y. 582 (30 N. E. 57), it was said:

"There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury. Besides, it affirmatively appeared that the rules in use by the defendant provided in a reasonable way against the occurrence of such an accident, so far as such casualties can be prevented by rules."

The following comment in *Morgan* v. *Iron Co.*, 133 N. Y. 666 (31 N. E. 234), is *apropos:*

"The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of

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the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and, if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in some way to have prevented it, or, in case it did not, respond to him in damages. Almost every conceivable injury that a servant receives in the course of his employment may in this way be submitted to a jury, and with the same result."

This accident occurred on a street railroad, where cars are expected to be under such control as to be stopped when the exigencies of public travel require it, and are incident to many delays that are not common upon steam roads. They are started and stopped at any and all points where occasion demands, and not in obedience to telegraph or telephone commands. As said by Chief Justice MONTGOMERY, with the approval of the entire bench, in *Mertz* v. *Detroit Electric Railway*, 125 Mich. 15 (83 N. W. 1036):

"The distinction between steam railways and street railways has been often pointed out. It is a fact that must be assumed to be within the knowledge of all persons *sui juris* that a steam-railway train cannot be brought under control within a short distance, while it is equally known that street cars in cities can be kept within control sufficiently to prevent collison with vehicles lawfully on the track."

See cases there cited.

We think the learned judge did not err in declining to submit this question to the jury.

There is another reason why plaintiff's contention should not prevail. He was not a passenger, but an employé, who was familiar with defendant's methods and rules; he knew that cars had been backed on this piece of road, and

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that it was likely to happen again; he knew that the cars did not carry red lanterns upon the rear, as is customary upon steam roads, and he knew what, if any, means there were of determining whether a car was approaching or going away from him; and, under such circumstances, he may be said to have assumed the risk of such methods. *Lang* v. *Transportation Line*, 119 Mich. 85 (77 N. W. 633).

The plaintiff would have had the trial court permit the jury to find that the responsibility for this collision rested upon Drouillard and Clixby, the conductor and motorman of the car that was backing up. Our attention is not called to any evidence that tends to show that it was due to any negligence of Clixby. Hence it is unimportant whether he was competent or not.

The testimony regarding Drouillard's negligence consists in the statement that he did not stand on the back platform all of the time that his car was backing up, it being shown that he took up a fare or two from a witness who got on at Twenty-Sixth street. This was the testimony of the passenger, and he said that Drouillard was in the act of taking the fare when the collision occurred. One Phelps testified that Drouillard jumped off from the car with two others, pulling the bell, just before the accident. His jumping from the car after giving the signal to stop, and when he could do no good by remaining on the car, would not be culpable nor negligent. His negligence, if any, was his absence from the platform, where the rule required him to be, and his consequent failure to stop his car earlier. It is not for us to say that the passenger's evidence is false, or that Phelps' is true. Taken together, this testimony raised the question of Drouillard's negligence as a cause of the collision, and made the question of his competency a proper one for consideration, if his incompetency, and defendant's negligence in relation thereto, were proved, to relieve the plaintiff from the effect of the fellow-servant rule, which is otherwise clearly applicable.

Before a master can be held liable on the ground that

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he has in his employ an incompetent servant, it must appear that he has been negligent either in employing or retaining him, and the burden of proof is upon the plaintiff. The presumption is that he was not negligent in either respect. *Davis* v. *Railroad Co.*, 20 Mich. 105 (4 Am. Rep. 364); *Michigan Cent. R. Co.* v. *Dolan*, 32 Mich. 509; *Walkowski* v. *Consolidated Mines*, 115 Mich. 629 (73 N. W. 895, 41 L. R. A. 33). Drouillard had worked for defendant about 10 weeks. One witness testified that, in his opinion, he was slow to act,—slow in ringing bells and stopping his car,—and could not grasp two or three ideas at a time. He did not testify to his general reputation. This witness did not inform defendant that Drouillard was not competent, although himself its employé, and he never told the union to which they both belonged. Henry Benns testified that he knew his reputation. He was then asked, "What was it,—competent or incompetent?" He did not answer the question asked, but replied, "Well, he was not competent to run a car." He was then asked what he had seen him do, and he said he had seen him get excited and give two bells when he ought to give one. On cross-examination he said he never reported him to the company or the union,—never told anybody; *had never heard of his having any accident*, except once, when *this plaintiff ran into his car*. Walter Smith testified that Drouillard's reputation was "not the best;" that "he was said not to be a good conductor, in that he was slow at times, and not quick to catch ideas;" and that it was common rumor that he had been excluded from operating certain lines of the defendant; and he also testified that he was short, and had to stand on his tiptoes to reach the bell cord, which would make a man slow in an emergency. John Hetherington said that he knew his reputation, and, when asked what it was, replied: "Well, what I could see, I judge he was incompetent; he was incompetent." On cross-examination he said he never heard anybody say he was incompetent, and did not understand the court's question to be what

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other people said about him; that what he said to the court was what he saw; and that he could not ring the bell and start the cars as quick as some, because he was short. He never reported him as incompetent, and never heard of his having an accident. If it can be said that all of the foregoing raised a question as to the fact of Drouillard's incompetency, it failed to raise any presumption that defendant knew it or ought to have known it, or that it should have removed him if it did know all that these witnesses testified to.

The judgment is affirmed.

The other Justices concurred.

FITCH *v.* BOARD OF AUDITORS OF CLAIMS AGAINST MANITOU COUNTY.

KANE *v.* SAME.

1. CERTIORARI—PARTIES—TOWNSHIPS.

   Under Joint Resolution No. 4 of the legislature of 1901 (Pub. Acts 1901, p. 382), providing for a board to audit claims against the disorganized county of Manitou, the territory of which had been divided between C. and L. counties, which claims, when allowed, were chargeable against the territory of the disorganized county, townships of the enlarged counties, although consisting of such territory in part only, were proper petitioners for a writ of *certiorari* to review the action of the circuit court in awarding *mandamus* against such board to compel the allowance of claims.

2. APPEAL—ERROR IN PRINTED RECORD.

   In case of a discrepancy between the original and the printed record on appeal, the former will control.

3. SAME—COSTS.

   An error in the printed record on appeal, justifying a motion to dismiss by the appellee, will impose costs of the motion on appellant.

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4. SAME — CONSTITUTIONALITY OF STATUTE — OBJECTIONS NOT URGED BELOW.
   Where the constitutionality of a law is attacked, objections and arguments against its validity may be urged on appeal, though not advanced in the court below.

5. CONSTITUTIONAL LAW—AUDITING CLAIMS—JUDICIAL POWER.
   Joint Resolution No. 4 of the legislature of 1901, creating a board to audit claims against the disorganized county of Manitou, with power to apportion the amount allowed against the territory formerly comprising the same, conferred judicial power on such board, in violation of article 6, § 1, of the Constitution, vesting the judicial power in the courts.

6. SAME—RIGHT OF REVIEW.
   The fact that, by the terms of the resolution, the action of the board was reviewable by *mandamus*, did not save its validity.

7. SAME—LEGISLATIVE POWER TO ALLOW CLAIMS.
   Nor could it be sustained on the ground that it is a legitimate exercise of legislative power to determine what debts a municipality shall pay, and to compel their payment; as the Constitution, by article 4, § 31, prohibits the legislature from auditing accounts.

8. SAME—CASES DISTINGUISHED.
   Neither the fact that the courts have upheld the exercise of judicial power by circuit court commissioners and by commissioners on claims against the estates of decedents, nor the fact that claims are habitually audited by boards of supervisors and county auditors, as well as by various officers of townships, cities, and villages, is controlling of the present question.

Certiorari to Charlevoix; Mayne, J. Submitted January 6, 1903. (Docket Nos. 3, 4.) Decided May 12, 1903.

Separate *mandamus* proceedings by Dwight H. Fitch and Arthur L. Fitch, copartners as Fitch & Fitch, and by Robert W. Kane, to compel the board of auditors of claims against Manitou county to audit and allow certain claims. From orders granting the writs, the several townships interested bring *certiorari*. Reversed.

Fitch & Fitch and *R. W. Kane, in pro. per.*

A. F. Bunting and *Thomas Smurthwaite*, for respondent.

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CARPENTER, J. We are asked in these two proceedings, which raise the same issue, to reverse the order of the court below issuing a *mandamus* compelling the respondent to audit certain claims; and the main question involved relates to the constitutionality of a joint resolution passed at the last session of the legislature, and found on pages 382-385, Pub. Acts 1901.

As appears by that resolution, the county of Manitou was disorganized, and part of its territory attached to Charlevoix county and part to Leelanau county, by Act No. 362, Local Acts 1895. Sections 6 and 9 of that act provided a method for the auditing of the accounts against said county. Said accounts never were audited. Therefore this joint resolution created a board of auditors—namely, respondent—consisting of the county clerk and county treasurer of Manitou county at the date of its dissolution, six years before, and the county clerks and county treasurers of Charlevoix and Leelanau counties. This board was directed to meet at the office of the county clerk of Charlevoix county, June 4, 1901, at 9 a. m., organize by choosing one of their number as chairman and another as clerk, and continue in session, not exceeding 20 days, until they had audited the accounts against said county of Manitou. The right was given to any person whose claim was rejected, and to any township aggrieved by the allowance of a claim, to resort to *mandamus* proceedings in the circuit court for the county of Charlevoix. It was made the duty of said board of auditors, after determining the amount of said claims, to apportion the same to the territory formerly comprising Manitou county, now attached to the counties of Charlevoix and Leelanau, "in the same proportion as the relative value" of the parts of said disorganized county attached to each "bear to each other, as fixed and determined by the board of supervisors of Manitou county at its October session in the year eighteen hundred and ninety-four." It was made the duty of each of said counties to pay its quota of said indebtedness out of funds in its treasury belonging to said disorganized county,

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and, in the event of the insufficiency of these funds, to raise the same by taxation on the territory which formerly comprised said disorganized county. The act contained this remarkable provision:

"No such claim shall be disallowed, if otherwise valid, solely for the reason that it is barred by the statute of limitations; the statute of limitations shall not apply to such claims."

Relators, the owners of various alleged claims against the county of Manitou, consisting of county orders, one issued April 15, 1882, three May 11, 1895, and the others on intermediate days, presented them to respondent, who constituted the board of auditors by virtue of the resolution above referred to. These claims were disallowed. They then applied to the circuit court for the county of Charlevoix for a *mandamus*.

Respondent's answer to the order to show cause stated that it refused to allow relators' claims for the reason that they were barred by the statute of limitations; that the joint resolution is unconstitutional and void, in that it seeks to resuscitate claims already dead by the statute of limitations, and in that it destroys vested rights. The court, after listening to the argument of counsel, ordered the *mandamus* to issue.

Before considering the question of the constitutionality of the resolution, it is necessary to dispose of a motion made in each of the cases now under consideration to dismiss the writ of *certiorari* issued by this court. In the first of these cases—namely, that in which Fitch & Fitch are relators—the motion is based upon the ground that the petitioners for said writ of *certiorari* who have not entered a disclaimer are certain townships in the county of Leelanau, each of which is composed in part of territory never forming a part of said county of Manitou. Inasmuch as a part of the taxpayers of each of said townships are liable to be taxed to pay the award in controversy, and this tax is to be collected by said township officers, we think they are proper petitioners, and this motion should therefore be denied.

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The motion in the other case—that in which Robert W. Kane is relator—is based upon the assumption that the only petitioners for said writ of *certiorari* who had not entered a disclaimer were certain former townships of the county of Manitou, which had been disorganized, and therefore had no corporate existence when said petition was made. This assumption was justified by the printed record served upon said relator. It was, however, erroneous, as is proved by an examination of the original record. It is quite clear that, notwithstanding the error in printing, this court must be governed by the original record, and therefore must deny the motion. We must, however, hold said petitioners responsible for the error which induced the making of this application, and therefore award costs of this motion to relator, to be paid by such of them as have filed no disclaimer.

Is the joint resolution unconstitutional? Respondent's counsel, both in their brief and argument in this court, contend that the joint resolution is unconstitutional, not only for the reasons urged in the court below, but because, contrary to the provisions of the Constitution, it attempts to confer judicial power upon respondent. Relators contend that this court should consider no other objection to the constitutionality of said joint resolution than was urged in the court below. This contention is based upon the principle, often asserted, that the jurisdiction of this court is limited to a review of such rulings of the circuit court upon questions of law as were distinctly presented and passed upon. See *Chatterton* v. *Parrott*, 46 Mich. 432 (9 N. W. 482). This principle has no application to this case. If this law is unconstitutional in attempting to confer judicial power upon respondent, the court below had no rightful jurisdiction to issue the *mandamus* complained of, and it is difficult to understand how even the consent of the respondent could have so conferred jurisdiction as to make the order complained of effectual for any practical purpose. But respondent did not consent. It objected, and objected, too, on the ground that the law was uncon-

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stitutional. In support of this objection certain reasons were advanced, certain arguments urged. It would be a monstrous proposition to say that other reasons may not be advanced in this court, and stronger arguments, if discovered, urged, against the action proposed to be taken. We do not think that this court should decline to hear and be influenced by these arguments, though it may be that if they had been brought to the attention of the trial judge his decision would have been different. It is generally true that the arguments in a case in this court, being made after counsel has had an opportunity to more thoroughly understand his case and examine the authorities, are different and better than they were in the court below. Nevertheless these arguments are not only heard, but they are welcomed. If this constitutional objection now under consideration is well taken, it would not be to relators' advantage to overlook it because it was not urged in the court below. If respondent has no constitutional power to make such a determination of these claims as to be legally binding upon the taxpayers in interest, these taxpayers will be heard to make that claim at some other time, if not now. If these proceedings amount to nothing, and must come to naught, it is wiser and better for every interest concerned that they be arrested at this juncture.

Is this resolution unconstitutional because it confers judicial powers upon respondent? The board of auditors created by this act are authorized to determine the validity and amount of claims presented to them, and to so apportion that amount that the property or taypayers of said disorganized county must pay it. In other words, they not only make a binding determination, which is equivalent to a judgment, but they make an apportionment against the property or taxpayers, without the sanction of a court, which is equivalent to an execution. This board of auditors does, in other words, all that a court can do in the premises. The Constitution of Michigan, article 6, § 1, having vested judicial power in one Supreme Court, in the circuit courts, in probate courts, and in justices of

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the peace, clearly does not authorize the legislature to vest judicial power in tribunals of this character. See *Chandler* v. *Nash*, 5 Mich., at page 417; *Risser* v. *Hoyt*, 53 Mich., at page 192 (18 N. W. 615) *et seq.; People* v. *Colleton*, 59 Mich. 573 (26 N. W. 771).

Says the supreme court of Wisconsin in a similar case (see *State* v. *Tappan*, 29 Wis., at page 684 [9 Am. Rep. 622]):

"The power to decide whether the town is under any legal obligation to pay the same or any portion thereof is vested by the constitution exclusively in the courts. The constitutional provision in that behalf, by necessary implication, excludes the legislative or executive branches of the State government from the exercise of judicial powers. These powers must be exercised by the courts alone, and any act which by its terms confers them upon any officer or person or other tribunal is absolutely void."

Nor can the constitutionality of this resolution be maintained on the ground that the judicial power conferred on the auditors is subject to a review by a court. See *Bissell* v. *Heath*, 98 Mich. 477 (57 N. W. 585). The provision for review in this case is altogether inadequate to preserve the constitutionality of the law. If an aggrieved party, by appealing, had an opportunity to retry his case in a constitutional tribunal, there would be less merit in the complaint that the trial, in the first instance, took place before an unconstitutional tribunal. But the resolution under consideration neither gives nor recognizes any such right of retrial. The only method of review open to an aggrieved party is a proceeding by *mandamus*. The issue in the *mandamus* proceeding is not what judgment should be entered, after judicial consideration of all proper evidence, but it is whether or not the lower tribunal erred in deciding some vital question in the case on the evidence submitted to it. In short, the decisions of the board of auditors, under this act, are no more subject to review than are those of the circuit court. Nor is it by any means clear that the return of this body, acting in a judicial

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capacity, will not, under the rules of practice applicable to *mandamus* proceedings, be accepted as true.

Nor do the decisions of this court that circuit court commissioners (see *Streeter* v. *Paton*, 7 Mich. 341), and commissioners on claims against the estates of deceased persons (see *Shurbun* v. *Hooper*, 40 Mich. 503), may exercise judicial powers, affect our conclusion. The constitutionality of the legislation there assailed was maintained because it was older than the Constitution, and its validity had been recognized ever since the Constitution was adopted. It is to be remarked, too, that the party aggrieved by the decision of a circuit court commissioner or commissioners on claims may have—as we have shown he cannot by the resolution under consideration—a retrial, which is a new trial, by appealing to the circuit court.

The fact that boards of supervisors, and in Wayne county the county auditors, audit claims against the county, has no relevancy to the question under discussion. The Constitution (see section 10, art. 10) gives these bodies that authority, and it does not give the board of auditors created by this act, who are not even officers of the parties in interest, power to exercise the authority conferred upon them.

Neither is there any force in the possible suggestion that respondent has the same power to audit these claims as is possessed and exercised by officers of municipalities other than counties. Officers of townships, cities, and villages do audit claims against their municipalities, and thereby make them valid and binding claims. In doing this they exercise no judicial power. They act as agents of the municipalities, their principals. If they reject those claims, they have made no adjudication which prevents the claimant securing redress in the courts. They are the agents, trusted and appointed by the corporation, and empowered to do that act. The members of the respondent board occupy no such relation to the taxpayers in interest. None of them are their officers or agents. Four

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of them never were, and two, though they were once, have not been for over six years.

Nor can this objection to the constitutionality of the resolution be answered by saying that it is a legitimate exercise of legislative power to determine what debts a municipality shall pay, and to compel their payment. It is true that decisions may be cited (see *Town of Guilford* v. *Cornell*, 18 Barb. 615; *Town of Guilford* v. *Board of Sup'rs of Chenango Co.*, 13 N. Y. 143; *Sinton* v. *Ashbury*, 41 Cal., at page 530; *Burrough of Dunmore's Appeal*, 52 Pa. St. 374; *Layton* v. *City of New Orleans*, 12 La. Ann. 515; *People* v. *Power*, 25 Ill. 187; *Town of Waterville* v. *Kennebec County Commissioners*, 59 Me. 80) which uphold this power of the legislature. Conceding the soundness of these decisions (and they have been criticised by eminent authority—see Cooley, Const. Lim. [6th Ed.] p. 283, and *State* v. *Tappan*, 29 Wis. 664 [9 Am. Rep. 622], heretofore quoted in this opinion), they have no application to the legislature of this State. Whatever power may be exercised by the legislatures of other States, the Constitution of Michigan, by expressly denying the legislature the power to audit an account (see section 31 of article 4 of the Constitution), prohibits *its* exercising the authority in question. See *People* v. *Supervisor of Onondaga*, 16 Mich. 254; *Bristol* v. *Johnson*, 34 Mich. 123.

It results from this opinion that the order complained of must be reversed, and the proceedings dismissed.

The other Justices concurred.

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STAPLETON v. GRAND TRUNK RAILWAY CO.

1. CARRIERS OF GOODS—LIABILITY—REMOVAL BY CONSIGNEE.
   Where a consignee of goods shipped by rail receipted for them on their arrival at their destination, removed a part of them, and himself placed the remainder in one of the railroad company's buildings, although he could have removed them also, the railroad company was not liable for the goods on their destruction by fire, without its fault, on the afternoon of the following day.

2. SAME—DELIVERY TO CARRIER.
   When a consignor of goods delivers them to the railroad company, relinquishing all control over them, the company becomes immediately liable as a common carrier; but if the goods are merely placed in the company's depot for the consignor's convenience, and are not ready for shipment until he has done something further to them, the company is not so liable.

Error to Wayne; Donovan, J. Submitted February 3, 1903. (Docket No. 63.) Decided May 12, 1903.

Assumpsit by William J. Stapleton against the Grand Trunk Railway Company for the value of goods destroyed by fire in defendant's freighthouse. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (*L. C. Stanley*, of counsel), for appellant.

Warner & Codd, for appellee.

MOORE, J. This is an action to recover for the value of goods destroyed in a fire which burned the freighthouse of the defendant at Mt. Clemens, on Monday, the 30th day of April, 1900, at 3 o'clock in the afternoon. The plaintiff is the surviving partner of George Norris & Co., of Detroit, manufacturers and dealers in bottled drinks. This concern had been doing business in Mt. Clemens for

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some 20 years, and in the course of business, on the 27th day of April, 1900, had shipped a quantity of goods to their agent, Patrick Bogue, at Mt. Clemens. A part of these goods reached there on Friday, April 27th, and a part on Saturday, April 28th. Immediately thereafter the plaintiff's agent receipted for the goods, and took some of them away. The rest he put into what was called the "jail," where he had previously put goods by the permission of his son, who was in the employ of the defendant company. He took one load away Friday, a load on Saturday, and two more on Monday. A fire occurred at 3 o'clock Monday afternoon, and goods to the value of $144.92, as testified by plaintiff, were destroyed. There were also destroyed in this fire a number of empty bottles and cases belonging to the plaintiff, which the plaintiff claimed were of the value of $379.35. The jury rendered a verdict in favor of the plaintiff for both lots of goods. The case is brought here by writ of error. There is no claim the fire was due to the negligence of the defendant.

In relation to the goods shipped from Detroit, the trial judge charged the jury, in part, as follows:

"The consignee (that is, the receiver) has a reasonable time after the arrival of goods at their destination to remove the same. Pending their removal within such reasonable time, the liability of the railroad company is that of a common carrier, and not of a warehouseman. This reasonable time is to be judged by all the circumstances connected with the transaction,—former dealings between the parties, and the ability of the consignee to remove these goods; and, if the jury find that the consignee used all reasonable diligence in removing the goods, the defendant is liable in this case, as a common carrier, for the value of the goods sent out, and your verdict should be for the plaintiff. That depends upon the testimony,—which side you believe."

We think this an incorrect statement of the law. In Hutch. Carr. (2d Ed.) p. 440 (§ 374), it is said:

"In New York the law upon this subject is stated to be that, if the consignee is present upon the arrival of the

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goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown, or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer. This view of the subject has also been taken by the courts of Minnesota and Michigan."

See cases cited in note.

In the same authority, at page 445 (§§ 376, 377), it is said:

"What length of time will be considered reasonable for the removal of the goods, at the expiration of which the carrier will be regarded as holding them as warehouseman, when such reasonable time is allowed the consignee, it is said, cannot be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case. When the facts are agreed upon or undisputed, it becomes a question to be determined by the court as one of law, but, where they are disputed and unsettled, the question must be submitted to a jury.

"It is said, however, that no indulgence will be given to the consignee by reason of the circumstances of his condition or situation, which may make delay in the removal of the goods unavoidable on his part; nor will the distance at which he may reside or have his place of business from the place of their deposit be taken into consideration, but he will be required to remove them with the same expedition as though he lived in the vicinity of the warehouse. In other words, the time within which the consignee is required to remove the goods will not be made to vary with his distance, convenience, or necessities, but only such time will be allowed as would enable him, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business. He must, moreover, proceed to remove the goods with diligence after he is informed of their arrival, and must provide himself with ample means for doing so. In *Hedges* v. *Railroad Co.*, 49 N. Y. 223, goods arrived for the plaintiffs early in the morning. They received notice of

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the fact an hour or two later on the same day, and gave directions to their carman to go for and bring them from the depot. The carman brought away one load, but during the balance of the day carted for the plaintiffs to other places or remained idle. No other directions were given, and no further effort was made to remove the goods. During the following night the goods were burned without the fault of the defendant. It was held that the loss must be borne by the plaintiffs, the defendant's relation to the goods having become changed before they were burned by the delay of the plaintiffs in removing them.

"'The plaintiffs seek to hold the defendant,' say the court, 'to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs in turn be held to prompt and diligent action. A consignee cannot, after he has notice of the arrival for him of property, defer taking it away while he attends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much time as the consignee, after notice, gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, cannot be allowed to him in estimating what is a reasonable time for him in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier; he may attend first to whatsoever demand of his business he deems the most urgent or the most profitable; but he cannot do this at the hazard and expense of the carrier. It is the duty of the carrier to give notice of arrival. It is the duty of the consignee, at once and with diligence, to act upon this notice, and to seek delivery, and to continue until delivery is complete. Either may neglect this, his duty, but then the consequence of the neglect must be borne by him.'"

This was not a large consignment of goods. Part of them arrived on Friday, and part on Saturday. The agent of plaintiff seems to have preferred to leave the goods where he did until it suited his convenience to remove them, instead of acting promptly. He had receipted for them, and himself placed them under lock and key. He had an abundance of time to remove them, but did not do so. Under the proofs, the circuit judge should have directed a verdict, as to these goods, in favor of

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defendant. See *Hasse* v. *Express Co.*, 94 Mich. 133 (53 N. W. 918, 34 Am. St. Rep. 328); *Moses* v. *Railroad*, 32 N. H., at page 541 (64 Am. Dec. 381).

The other branch of the case is more difficult. Mr. Bogue was in the habit of gathering up empty bottles from plaintiff's customers, and sending them back to Detroit in shipping cases. The bottles and cases in controversy had been deposited by him on one of the outside platforms of the freighthouse, preparatory to their shipment to Detroit. It was the claim of plaintiff that these goods were ready for shipment, and that the agent of defendant had been notified to ship them as soon as the company was ready. It was the claim of defendant that plaintiff was in the habit of bringing the bottles and cases to the platform and sorting them there, sometimes leaving them there for days, until he got them ready for shipment, and that when they were ready he notified the agent, and a bill of lading was made out for them; but that, upon this occasion, defendant had no notice the goods were ready for shipment, and that they were not in its possession as a common carrier. This raised a question of fact for the jury, under proper instructions. In Hutch. Carr. (2d Ed.) § 94, it is said:

"The entire responsibility for the safety of the goods being shifted from the owner to the common carrier as soon as the delivery is made, it frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time such delivery becomes complete; for, as we have seen, until the entire and exclusive custody of them has been given to the carrier, no responsibility rests upon him in that character. The most that can be said generally upon this subject is that, a tender of the goods being made to the carrier, his liability for their safety as carrier arises *eo instanti* with his acceptance of them. * * * To effect a delivery to the carrier, there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and, until this has been done, it cannot be

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said that the carrier has assumed any responsibility for them as carrier."

See, also, Id. § 96; *Meloche* v. *Railway Co.*, 116 Mich. 69 (74 N. W. 301).

If in this case Mr. Bogue had done all he intended to do to the goods before the goods were shipped, and had notified the agent of the defendant they were ready for immediate shipment, and the agent agreed to forward them, that would be sufficient to make the company liable as a common carrier. 5 Am. & Eng. Enc. Law (2d Ed.), 180. If this had not been done, it would not have been so liable.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

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LA BARRE *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. RAILROADS—INJURY TO SECTION HAND—LOADING RAILS—MOVING CARS—NEGLIGENCE.

Where, in an action for injuries to a section hand while loading rails on moving cars, there was no proof to rebut evidence that rails were ordinarily loaded on cars while in motion, the adoption of such method did not constitute negligence.

2. SAME—WARNING OF DANGER—QUESTION FOR JURY.

Whether it was the duty of the railroad company to have instructed such employé as to the manner of doing the work, and to have warned him against the danger of a rail falling from a car after it had been thrown thereon, was for the jury.

3. SAME—FELLOW-SERVANTS—VICE-PRINCIPAL—INSTRUCTIONS TO JURY.

Plaintiff in such action claimed that the injury was occasioned by undue haste in moving the train, which was at the time in charge of an assistant roadmaster, the conductor being absent; but such roadmaster testified that the speed of the train was entirely controlled by the engineer. *Held:*

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(1) That whether the injury was due to the roadmaster's negligence was a question for the jury.

(2) That, if it *was* so due, defendant was liable, as the roadmaster was not plaintiff's fellow-servant, but a vice-principal.

(3) That, if the negligence of the engineer alone caused the accident, there could be no recovery, as the engineer *was* such fellow-servant.

(4) That it was error not to give the last-mentioned proposition in instruction to the jury; a general charge that plaintiff could not recover if his injury was due to the negligence of a fellow-servant being insufficient.

Error to Cass; Carr, J. Submitted December 5, 1902. (Docket No. 149.) Decided May 12, 1903.

Case by Frank La Barre against the Grand Trunk Western Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellant.

W. C. Jones and *M. L. Howell*, for appellee.

Hooker, C. J. The defendant has brought error on a judgment for $4,000, recovered by the plaintiff for personal injuries received while loading rails upon a moving train. The negligence relied upon is:

1. That he was inexperienced in such work, and was given no instructions how to do it, nor any warnings against the danger of a rail falling off after it was thrown upon the moving car.

2. That the work was done in such haste as to make it unnecessarily dangerous.

The defendant contends that the court should have said to the jury:

1. That the method of loading the rails was not negligent.

2. That the plaintiff assumed the risks of the employment.

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3. That the plaintiff's injury was caused by his own negligence.

4. That, if any other persons were guilty of negligence which contributed to cause the accident, they were fellow-servants of plaintiff, for whose negligence the defendant is not liable.

There is much testimony tending to show that the general method adopted of loading these rails—*i. e.*, upon moving cars, with gangs of men taken from section gangs—was the ordinary method of doing such work, where the rails have been obtained from taking up an old track. We think there is no proof to the contrary, and therefore, so far as defendant's general method, adopted in this instance, is concerned, it was not shown to be negligent. We do not overlook the case of *Palmer* v. *Railroad Co.*, 87 Mich. 281 (49 N. W. 613), which is said to be on all fours with this case. We think that case does not hold that in all cases a court must leave to the jury the reasonableness of this method of loading rails,—*i. e.*, loading them upon moving cars,—and that a jury in any and every case may award damages to persons injured if the train is not stopped for the loading of each individual rail. If it could be said that such was the holding, it was at best under the proofs in that case. In another the undisputed proof might show the contrary.

But we think the inference is not warranted. Many more things than the general method are involved in that case. For instance, every one must admit that there is a limit to the ability of men to keep up with a train, and there is a limit to human endurance, and, should this be passed through the fault of the master, we are not prepared to say that there might not be circumstances under which he should be held liable for the consequences. In the case before us, if it is true that the men were forced beyond their powers of endurance, or ability to keep up or to avoid injury, and the plaintiff was injured in consequence, the fault was that of some one or more of the defendant's servants.

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The plaintiff claims that the defendant's train and men were in charge of an assistant roadmaster, who had general supervision of all. If it can be said that the alleged haste was due to him, and that he was not a fellow-servant, the master must be held responsible for the haste. There was testimony, also, that this man was not instructed, and that he was not warned. We cannot say that it was necessary that he should be, and, while we are impressed that this was much like common labor, and that the sectionman who is in the habit of handling rails can hardly need information as to the way in which they should be handled, even in loading a moving car with them, we cannot say, as matter of law, that the defendant did not owe him the duty claimed. In the *Palmer Case* this was held to be a question for the jury. This being so, the duty was that of the master, and the failure to give it was the negligence of the master, if it was negligence.

The assistant roadmaster testified that he merely happened to go with the train that day to check up the rails; that the train was in charge of a conductor, and the gang of a foreman. It goes without saying that whoever was in charge of that work owed it to the men to see that they were not overworked through undue haste; but whether the master is accountable or not must depend upon whether such person is to be held a fellow-servant or not. It is claimed that the assistant roadmaster was the vice-principal, and such was the holding in the *Case of Palmer, supra*, and the company was held liable under the facts in that case. Exhaustion, and danger from undue haste in running the train, might be due to the negligence of the engineer or conductor, or it might be due to negligence in the management of the enterprise by a foreman in charge of the job, without any negligence of a vice-principal, if one were present; and, if so, as all were engaged in the common enterprise, the plaintiff could not recover for such negligence, because it would be that of a fellow-servant, which is an assumed risk. Upon this branch the case is

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resolved into two questions: (1) Was the negligence of the assistant roadmaster the cause of the injury? (2) If so, does the fellow-servant rule apply? The first question is one of fact, and properly belongs to a jury. The second is one that has caused most courts trouble.

The general rule established in this State is that the question of whether or not one is a fellow-servant is to be settled by the nature of the act, rather than the rank of the respective servants. When that rule can be applied, it furnishes a comparatively safe guide. Counsel for defendant contend for its application here. On the part of the plaintiff it is contended that there is a class of servants for whose negligence the master is liable, although, if it were the negligence of one belonging to another class of servants, he would not be. This is upon the theory that one who represents the master in the way of general control of the business, as his representative, is his vice-principal, and binds him. It is manifest that this is, in a sense, antagonistic to the former rule, for in a way many servants represent the master, and have, in the division of labor, control, more or less general, in their respective departments, who are called "fellow-servants." Yet the doctrine exists, and there is much to be said in favor of its application in proper cases. The necessary consequence, however, is a constant struggle for its extension by servants, and a corresponding effort for its restriction by masters, which serves to illustrate the necessity for a consistent rule, which shall make the line of demarkation plain and reasonable, instead of uncertain and arbitrary. But it is not easy to suggest a test which can be safely said to be an infallible one.

In *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34 (3 N. W. 240), there is an intimation of the rule contended for by the plaintiff, but it is held that a timberman in a mine does not come within it. It is hinted at in *Smith* v. *Potter*, 46 Mich. 265 (9 N. W. 273, 41 Am. Rep. 161), but held that an inspector of cars has not a duty of management or general supervision, and is not within such rule. It was

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announced in *Ryan* v. *Bagaley*, 50 Mich. 179 (15 N. W. 72, 45 Am. Rep. 35), and applied to a mining captain, who had exclusive and complete control of the physical part of the master's business. In that case the rule was carefully limited.

The case of *Hunn* v. *Railroad Co.*, 78 Mich. 513 (44 N. W. 502, 7 L. R. A. 500), extended the rule to one who did not have exclusive and full control of defendant's business, and applied it to a train dispatcher, who had supervision over the running of trains. Presumably, he did not determine what trains should be sent out, and the case, while well supported by authority in some States, is at variance with decisions in others, and is said to be within the principle of *Ryan* v. *Bagaley*, *supra*, because the train dispatcher is "given supreme control;" and it is also said that "his act is the act of the master."

In *Harrison* v. *Railroad Co.*, 79 Mich. 409 (44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. Rep. 180), an assistant roadmaster took a train to move telegraph poles for some construction or repair work. He personally gave directions to a member of the working gang, who was injured in consequence. It was held that they were not fellow-servants, and it was left to the jury to say whether the injury was the result of his negligence or that of the engineer, upon which liability was made to depend. *Id.*, 79 Mich. 416. The discussion from page 421 to 428 apparently indicates the view that the assistant roadmaster represented the master.

The case of *Palmer* v. *Railroad Co.*, 87 Mich. 281 (49 N. W. 613), *Id.*, 93 Mich. 366 (53 N. W. 397, 17 L. R. A. 636, 32 Am. St. Rep. 507), closely resembles the present case.

In *Erickson* v. *Railway Co.*, 93 Mich. 414 (53 N. W. 393), the doctrine was applied to the foreman of a gravel train. The question was passed over without much discussion, and was said to have been ruled by the *Harrison Case*. It is difficult to distinguish this case from one involving the negligence of the conductor of any train.

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In *Gavigan* v. *Railway Co.*, 110 Mich. 71 (67 N. W. 1097), a section foreman was held to be a fellow-servant of his men.

In *Morch* v. *Railway Co.*, 113 Mich. 154 (71 N. W. 464), a foreman sent in place of a roadmaster was held not to be the *alter ego*. This case and the *Schroeder Case*, *infra*, are distinguishable from most of the others, as the foremen had no general authority or control of a branch of the road or business. They were simply in charge of their respective gangs.

The embarrassment from these decisions was foreseen and indicated in *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 203 (61 N. W. 658, 27 L. R. A. 266), where the question was reserved, and *Schroeder* v. *Railroad Co.*, 103 Mich. 213 (61 N. W. 663, 29 L. R. A. 321, 50 Am. St. Rep. 354), where the authorities are discussed. In the latter case a foreman was held not to be the *alter ego*.

It will be seen from this review that the assistant roadmaster is within the rule contended for by the plaintiff, and, if the negligence was his, the master was liable. The jury so found, and it was not error on the part of the learned circuit judge to submit the question.

We cannot say that the undisputed proof shows plaintiff to have been guilty of contributory negligence, and no authority is cited to the proposition that, "if any fellow-servant was guilty of any negligence which contributed to the accident, defendant is not liable." *Hunn* v. *Railroad Co.*, 78 Mich. 513 (44 N. W. 502, 7 L. R. A. 500). We are not certain that counsel intended to be understood that a plaintiff is affected by contributory negligence of a fellow-servant. If not, their contention is probably satisfactorily disposed of by our holding that, if the negligence of the engineer alone caused the accident, without fault on the part of the assistant roadmaster, the plaintiff could not recover. See *Harrison* v. *Railroad Co.*, 79 Mich. 416 (44 N. W. 1034, 7 L. R. A. 623, 19 Am. St. Rep. 180).

There is no reason to question the general rule that an

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employé assumes the risk of the dangers incident to the business in which he engages, so far as they are understood or apparent. The plaintiff did so in this case; but he cannot be said to have assumed the risk of the negligent acts of the master himself, or one who is his *alter ego*, within the cases cited. The plaintiff's injury is, according to his claim, due to one or both of two causes: (1) Ignorance of a danger; (2) unreasonable haste in doing the work. Unless we can say as matter of law, from the undisputed evidence, that this work was such that one ordinarily employed, and who had experience, as a sectionman, should have understood the danger, there was a duty of instruction and warning, and this duty was that of the master, who could not avoid the responsibility by imposing it upon a servant.

Again, while the general method of loading rails on moving cars may not be negligent, there may be circumstances under which, and times when, it is not prudent, and when to keep the train in motion might be negligence on the part of the person responsible therefor. In such case the master might or might not be liable, depending upon whether the negligence was that of a fellow-servant or not. A jury should not be given to understand that a master is liable when he is only made so by treating as a part of the general method adopted by the company all of the departures from prudence by those charged with the work. In this case the defendant had a right to send a train to move these rails, in charge of a competent man, without explicitly pointing out the exact method, whether by loading upon moving or stationary cars or prescribing a rate of speed. The management might be negligent or not, according to what should be done.

The plaintiff claims that the negligence consisted in not warning the plaintiff, and in overtaxing the men by undue speed, for which the person who set plaintiff at work and the assistant roadmaster were to blame. There was testimony that the train was in charge of a conductor, who controlled the speed by signaling the engineer, and a fore-

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man, who supervised the work of the men by directing them when to throw the rails, though it is admitted in defendant's brief that this accident occurred when the conductor was absent, and while the assistant roadmaster was acting as conductor, and that he directed that the train be moved at the rate of one mile per hour. He testified, however, that he gave no orders, and had nothing to do with the control of the train, and that he merely happened to be there that day, and that the engineer controlled the speed. Again, he said:

"That day I was simply on the train keeping tab on my car numbers and the number of rails loaded, so I could make my report. I was busy until they were through loading. I was simply right there with the train, keeping check of my rails and cars. The train didn't move under my orders. I told the engineer and the conductor that the rails would be loaded while the car was moving. I think I told the engineer to go about a mile an hour."

This testimony made it possible for the jury to find that the accident was not due to the assistant roadmaster's negligence, and that it was ascribable to the engineer. *Harrison* v. *Railroad Co.*, *supra*. The charge recognized no such possibility, and left the jury nothing to do but to find a verdict of guilty if the jurors found that an injury resulted from undue speed or an improper method of loading. It is true that the judge told the jury that the plaintiff could not recover if the plaintiff or his fellow-servants were guilty of negligence contributing to the injury, but they were *not* told who his fellow-servants were, and they may have understood the term to have application to members of his work gang only. There was not a hint that the engineer or foreman was a fellow-servant, yet there is proof that the foreman gave the word to throw when plaintiff was hurt. In view of these facts, instruction that "the master was represented by James Hamilton, the assistant roadmaster," and that "the defendant is responsible for the management of the work, and the negligence of management is the defendant's negligence," was too broad.

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This was apparently a request to charge of the plaintiff's counsel, and, while requests to charge are frequently efficient aids to the trial judge, they are apt to be, as in this case, misleading, when they are given to the jury as such. It is preferable and safer to give a connected and logical charge, in which so much of the various requests as can be properly and profitably used is included without reference to the fact that they are requests of either party.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

WETTLAUFER *v.* AMES.

1. Dower—Merger—Presumptions.
   Where all of the heirs of a deceased landowner quitclaimed to the widow, who afterwards reconveyed to the heirs, reserving her dower right, *held*, that such right remained in the widow, an intention that it should not merge by the deed to her being presumed as in accordance with her interest.

2. Same—Assignment—Partition—Appeal.
   While, under 3 Comp. Laws, § 11016, dower may be set off in an ordinary partition suit, the court's refusal to do so, on the ground that the right had become extinguished, can be complained of only by the claimant.

3. Easements—Merger—Revival.
   Where the owner of a lot entitled to an easement over an adjoining lot acquired the fee in the servient estate, and later, and while the easement was being used, deeded the two lots to different parties, the easement, which had been merged in the fee, was revived.

4. Partition—Mortgage Sale—Redemption.
   Under 3 Comp. Laws, § 11020 *et seq.*, § 11050 *et seq.*, a tenant in common can maintain a partition suit against his cotenant, though the latter has redeemed the property from a foreclosure sale, and the former has neither paid nor tendered his share of the cost thereof.

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5. TENANCY IN COMMON—ACCOUNTING—RENT.

A tenant in common may, on an accounting with his cotenants, be charged with rent for his occupancy of the premises, if in accordance with the understanding of the parties.

6. SAME—REDEMPTION—INTEREST.

A tenant in common who redeems from a mortgage foreclosure is entitled to interest on the amount paid, as against his cotenants, at the legal rate, rather than at the rate borne by the mortgage.

Cross-appeals from Wayne; Donovan, J. Submitted January 7, 1903. (Docket No. 10.) Decided May 12, 1903.

Bill by John C. Wettlaufer and Henry Wettlaufer against Annie C. Ames, August F. Wettlaufer, Mary Berringer, and Mary Wettlaufer for a partition. From the decree rendered, complainants, and defendants Ames and August F. Wettlaufer, appeal. Affirmed.

Walker & Spalding, for complainants.

Charles W. Casgrain, for appealing defendants.

HOOKER, C. J. Previous to his death, Frederick Wettlaufer was the owner in fee of a parcel of land and two-story brick building thereon, at the corner of St. Antoine and Mullett streets, in the city of Detroit, which, for convenience, we will call "Lot A." Adjoining it on the north was an elbow-shaped lot, fronting on St. Antoine street and Gratiot avenue, described as lot 7. The accompanying plat will serve to show the situation of the premises.

Lot 7 was owned jointly by Frederick Wettlaufer and his wife, Mary. Lot A was wholly covered by a brick building, the dotted lines on the plat showing wooden partitions, by which the building was divided into three store rooms. At the north end there was a passageway six feet wide, with a door near the west end of the north wall of the building, opening upon, and giving access to,

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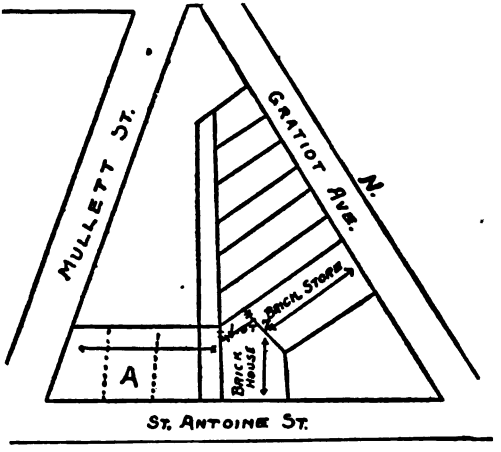
the adjoining lot 7, which was covered by a brick dwelling fronting St. Antoine street, and a brick store fronting Gratiot avenue. The passageway furnished the only means of access to the back rooms of these buildings, except through the buildings themselves, from their respective front entrances. The sewer drain for all of the buildings was underneath the passageway mentioned.

After the death of Frederick Wettlaufer, his widow, Mary, deeded lot 7 to the complainants, John and Henry Wettlaufer, her sons, and lot A was deeded to her by all of the heirs of Frederick, viz., all of the parties to this



suit except herself. They were all sons and daughters of Frederick and herself. Subsequently some dissatisfaction arose over the appropriation of the rents received from lot A, and Mrs. Wettlaufer deeded lot A to the five sons and daughters, reserving her right of dower, and on the same day, though later, deeded her interest in lot A to the complainants, who thereupon made a claim of ownership. They afterwards filed the bill in this case, asking an accounting for the rents and profits and a partition of the lot A. The bill alleges that Mary Wettlaufer is entitled to her dower interest therein. The bill was taken as confessed by Mary Berringer and Mary Wettlaufer, the

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widow. August F. Wettlaufer and Annie C. Ames answered.

At the time Frederick died, there was a mortgage upon lot A. The premises were afterwards redeemed after foreclosure by August F. Wettlaufer and Annie C. Ames. Annie and her husband afterwards occupied a portion of the premises upon an agreement of the husband to pay rent, which he did. After his death she continued to occupy the premises, and part of the time, at least, paid some rent, under an agreement with August, to whom she paid it.

The complainants ask the benefit of an accounting of the rents and income received from, and the disbursements and liabilities incurred on behalf of, the property by all of the parties, and that the amounts found due to and from the respective parties be decreed to be liens on the respective debtors; that Mary Wettlaufer's dower be admeasured, and that the decree direct the manner in which the same shall be satisfied and discharged; and that partition be had of the property, and, if division of the same cannot be made without great prejudice to the owners, a sale may be had, and the proceeds divided as the interests of the respective parties may be found.

Upon a hearing of the cause the trial court decreed that each of the parties, except the widow, had an undivided one-fifth interest in the premises, subject to certain deductions, which constituted liens; that Mary Wettlaufer had no interest in the premises. An account was taken, in which each party was credited with his or her disbursements, and charged with a share of the mortgage debt paid by Annie C. Ames and August F. Wettlaufer. Such parties as had received rents were charged with them, and Annie C. Ames was charged with rent for the premises occupied by her, while such as had made disbursements were credited with them. The premises were found to be so situated that a partition would be prejudicial to the owners, and it was decreed that they be sold, and the proceeds divided, such sale to be subject to an easement in

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favor of the complainants, their heirs and assigns, for their access to lot 7. A solicitor's fee of $150 was allowed to the complainants, in addition to the taxable costs and expenses of the suit and sale, to be paid out of the fund.

The defendants August F. Wettlaufer and Annie C. Ames and the complainants have appealed. The complainants urge:

1. That dower should be set off to the widow.
2. That the property should be partitioned, or, at least, that the north store should be set off to them, which portion should include the six-foot passage mentioned. They were indifferent as to the sale of the other part of the premises.

The defendants contend:

1. That, inasmuch as the complainants have neither paid nor tendered their share of the cost of redemption of the premises, they cannot have a partition.
2. That, if this is not so, no allowance for dower should be made.
3. That Mrs. Ames should not have been charged with rent, because, as a tenant in common, she had a right to occupy the premies without charge.
4. The property should not have been sold subject to the easement.
5. Interest upon the money paid for redemption should have been at the rate of 8 per cent., that being the rate fixed by the mortgage; citing 2 Comp. Laws, § 4865.
6. The solicitor's fee of $150 was excessive.

The defendants say that the right to dower was extinguished by merger when they united in a quitclaim of the premises to their mother. We are of the opinion that a different intention may reasonably be deduced from the circumstances. The rule that a merger will not be found, in the absence of expressed intention, if a continuance of the lesser interest is beneficial to the owner, applies. That is the rule as to cases where a mortgage is purchased by the owner of the fee. See 20 Am. & Eng. Enc. Law (2d Ed.), 1064. Among the many cases cited in support of this are the following Michigan cases: *Bassett* v. *Hathaway*, 9 Mich. 28; *Powell* v. *Smith*, 30 Mich. 451;

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Ann Arbor Sav. Bank v. *Webb*, 56 Mich. 377 (23 N. W. 51); *Cook* v. *Foster*, 96 Mich. 613 (55 N. W. 1019); *Burt* v. *Gamble*, 98 Mich. 409 (57 N. W. 261), and cases cited; *Ten Eyck* v. *Railroad Co.*, 114 Mich. 499 (72 N. W. 362); *Quick* v. *Raymond*, 116 Mich. 15 (74 N. W. 189). Many cases hold that merger will never be allowed in equity, unless for special reasons, and that, at the least, it is a matter of intent, which will be presumed in accordance with the interest of the owner. See 20 Am. & Eng. Enc. Law (2d Ed.), 590, 591, and notes. We have no difficulty, under such a rule, in holding that there was no merger. The dower interest remained in the widow, unless it was devested by her quitclaim deed to John and Henry, it having been reserved in her earlier deed to the five children; and as John and Henry do not claim it, but admit that it is still in the widow, and ask that it be set off to her, we need not discuss its whereabouts further, but only the question whether it should be set off to her in these proceedings. That it might have been is settled by 3 Comp. Laws, § 11016; but the widow has not appealed, and the complainants cannot complain of the decree so far as her interests are concerned.

We are satisfied that the learned circuit judge was justified in requiring all of lot A to be sold, rather than to set off a portion of it to the complainants, and that he did not err in directing that it be sold subject to an easement appurtenant to lot 7. The record indicates that, previous to the time that Frederick Wettlaufer became the owner of these premises, a strip of land about six feet wide extended along the short side of lot 7, and in the rear of lots 1, 2, 3, 4, 5, and 6, and there was and still is a sewer there, which we infer to be still in use by the owners of lots A and 7, and perhaps other lots, through which it extends. Apparently a hallway for common use extended through the various buildings built over this strip, for the testimony shows that, when Frederick Wettlaufer bought lot A, he made an arrangement with the property owners to discontinue this hall on the other property. Upon the

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death of Frederick, his wife became sole owner of lot 7 by survivorship, and a month later she acquired a full title to lot A. The effect of this was to merge the easement in her more complete title. The building was then erected on lot A, in which this hallway was preserved, and from the northwest corner a door opened into a hall in the rear of the brick dwelling, through which access was had to the brick block on Gratiot avenue. Some four years later she deeded this lot A to her five children, reserving her dower rights, as already stated. On the same day she conveyed lot 7 to the complainants, after deeding lot A, as aforesaid. At this time the hall was plainly in use as an appurtenance to lot 7. The defendants must have known it, as well as the fact that the sewer was in use, and that the drainage from the roof of the buildings on lot 7 ran into it. Under these circumstances, we think the old easement was revived. Mary Wettlaufer clearly manifested her intention that the hall should be used as appurtenant to lot 7. Had she sold lot 7 to a stranger and retained lot A, an easement would have passed with the property. The defendants, who took title to lot A in common with the complainants, should be held to have taken the land subject to the easement. *Kieffer* v. *Imhoff*, 26 Pa. St. 443; *Phillips* v. *Phillips*, 48 Pa. St. 178 (86 Am. Dec. 577); *McCarty* v. *Kitchenman*, 47 Pa. St. 241 (86 Am. Dec. 538); *Pennsylvania R. Co.* v. *Jones*, 50 Pa. St. 424; *Overdeer's Adm'r* v. *Updegraff*, 69 Pa. St. 119; *McTavish* v. *Carroll*, 7 Md. 360 (61 Am. Dec. 353); *Brakely* v. *Sharp*, 9 N. J. Eq. 14; *Dennis* v. *Wilson*, 107 Mass. 591.

In Vermont and Massachusetts it has been held that one is not entitled to partition against his co-tenant holding under a valid tax title, or one who has redeemed from a foreclosure sale. See *Hurley* v. *Hurley*, 148 Mass. 444 (19 N. E. 545, 2 L. R. A. 172); *Wilmot* v. *Lathrop*, 67 Vt. 671 (32 Atl. 861). It is said that the case of *Reed* v. *Reed*, 122 Mich. 77 (80 N. W. 996, 80 Am. St. Rep. 541), has committed this court to the same doctrine; but we

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think otherwise. A different question was involved in that case. In Vermont and Massachusetts a mortgagee takes the legal title in the land mortgaged. That is not so in Michigan; therefore it cannot be said that co-tenants have no rights of possession against a mortgagee or his assignee, whose redemption inures to the benefit of his co-tenants. But, whether or not this distinction is a sufficient reason for not following these cases, our statutes seem to contemplate that persons holding mortgages and other liens may be made parties, and their interests adjusted, in partition proceedings instituted by owners of the land. 3 Comp. Laws, § 11020 *et seq.*, § 11050 *et seq.*

We are of the opinion that Mrs. Ames was rightfully charged with rent, taking into consideration the nature of her occupancy and the understanding of all of the parties, at the sum fixed by the decree.

We think that the rate of interest was correctly fixed by the learned circuit judge, and that we should not interfere with his discretion in the matter of costs.

The decree is affirmed, without costs to either party.

The other Justices concurred.

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SUNLIN *v.* SKUTT.

1. PARTNERSHIP—TORT OF ONE PARTNER—LIABILITY OF COPARTNER.

   Where property of a third person is unlawfully taken by one of two partners, and is employed in the partnership business, the other partner is liable for its use, though supposing it to belong to his copartner.

2. JOINT TRESPASSERS—DISCHARGE.

   The release of one joint trespasser is the release of all, irrespective of the intention of the parties.

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3. SAME—PLEADING—GENERAL ISSUE.

The defense to an action of trespass to personal property, that plaintiff settled with defendant's co-trespasser, is inadmissible under the general issue, even in justice's court.

Error to Kent; Wolcott, J. Submitted February 18, 1903. (Docket No. 103.) Decided May 12, 1903.

Trespass *de bonis* by Louis F. Sunlin against Henry Skutt. From a judgment for defendant, plaintiff brings error. Reversed.

This case originated in justice's court, was appealed to the circuit court, and there tried without a jury. It is an action of trespass to personal property. The written findings are as follows:

"1. That, in the spring of 1900, plaintiff was the owner of a steam pump, which was at that time situate in his stone quarry at No. 500 N. Front street in the city of Grand Rapids; that he left the city in the month of April, 1900, and did not return until the month of May, 1901; and that the plaintiff operated his stone quarry at 500 N. Front street in the year 1895, and in the year 1898 it was operated by one Daniel Davis.

"2. And I further find that in September, 1900, Eaton & Williams were running a stone quarry in Grand river, in the city of Grand Rapids, on property belonging to the Comstock estate, operating their pump and drills by hand; that the said Daniel Davis, who was working for them drawing stone, told them that he owned a steam pump which they could use; that Eaton and Williams accompanied Mr. Davis to what afterwards proved to be Mr. Sunlin's quarry, and removed the pump to the said quarry of Eaton & Williams, where it was set up and used by them about a week in operating their quarry, when Eaton & Williams sold out their interest in the quarry to the defendant, Henry Skutt, who entered into an agreement with said Daniel Davis to operate said quarry, said Davis to furnish his own labor, together with his team, wagon, and a steam pump, as against the labor of said Skutt, together with his team, wagon, and steam drill.

"3. That said quarry was operated by said Skutt and Davis under said agreement (barring times when it was

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shut down on account of storms and when the dam was out) up to January 3, 1901, a total of 88 days, when the quarry was closed up, and Skutt bought out the interest of Davis in the stone then on the bank of the river, and Skutt took away the drill, and the steam pump was taken down at the direction of Mr. Davis, and left at the edge of the quarry by the bank of the river.

"4. I further find that the defendant, Henry Skutt, never knew the pump was the property of the plaintiff, Sunlin, until the spring of 1901, after it had been returned to Mr. Sunlin by Mr. Davis, but believed the same was the property of Mr. Davis.

"5. I further find that in 1901, before this suit was brought, the plaintiff accepted $40 of Mr. Davis for the use of said pump.

"6. I further find that the defendant, Skutt, never had any knowledge of, concurred in, or ratified the taking of plaintiff's pump by said Daniel Davis, and never received the benefit of said taking; it being the duty of said Davis, under the agreement by which the quarry was being operated, to furnish his own labor, a team, wagon, and steam pump, as against the labor of Skutt, his team, wagon, and steam drill.

"*Conclusion of Law:* The pump having been taken by said Daniel Davis without the knowledge, consent, or concurrence of said defendant, it follows, as a matter of law, that the defendant is not liable to the plaintiff in the action of trespass."

C. H. Gleason (*Arthur Lowell*, of counsel), for appellant.

Smedley & Corwin, for appellee.

GRANT, J. (*after stating the facts*). We think the learned circuit judge was in error in holding that the defendant was not liable. The pump was used in the partnership business, and both of the partners received the benefit of it. That defendant acted in good faith is true; but good faith in the purchase or use of personal property is no defense as against the rightful owner. He who purchases or uses the property of another, taken unlawfully, is liable to the owner in an action of replevin

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without demand, or an action of trover for conversion, or, if the property is returned or retaken, for the value of the use by the innocent trespasser. *Haviland* v. *Parker*, 11 Mich. 103; *Trudo* v. *Anderson*, 10 Mich. 357 (81 Am. Dec. 795). "Absence of bad faith can never excuse a trespass." *Cubit* v. *O'Dett*, 51 Mich. 347 (16 N. W. 679). A teamster is equally liable with a sheriff when taking property not covered by his writ. *Kane* v. *Hutchisson*, 93 Mich. 488 (53 N. W. 624). So, an auctioneer is liable in trover for the unlawful sale of goods under a chattel mortgage, though he act in good faith. *Kearney* v. *Clutton*, 101 Mich. 106 (59 N. W. 419, 45 Am. St. Rep. 394). This case does not fall within the rule invoked by the defendant, and stated in 1 Jaggard, Torts, § 99, as follows:

"In order that responsibility be attached to a partner with respect to a tort, it is necessary either—(*a*) that he should have authorized it, or joined in its commission, in the first instance; (*b*) that he should have made it his own by adoption; or (*c*) that it should have been committed by his copartner in the course and as a part of his employment."

The pump was taken by the joint action of both partners as soon as the partnership was formed and the work commenced. It was used by them while they remained in partnership. When property is thus used by a partnership, the partnership is liable to the owner, although one partner may innocently believe that the property is actually owned by the other.

After this case was tried, the case of *McBride* v. *Scott*, 132 Mich. 176 (93 N. W. 243), was decided. This court notified the attorneys to file briefs upon the question whether the settlement with one of the trespassers had not released the defendant under that decision. Briefs were furnished, showing that the defense was not made in the court below, and claiming that it was not admissible under the general issue. The objection is well taken, otherwise the judgment should be affirmed. The defense is not

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available under the general issue. Cir. Ct. Rule 7; section 767, 1 Comp. Laws; *Hubbard* v. *Freiberger*, *ante*, 139 (94 N. W. 727).

The judgment is reversed, and new trial ordered.

The other Justices concurred.

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N. & M. FRIEDMAN CO. *v.* ATLAS ASSURANCE CO.[1]

1. FIRE INSURANCE—FALL OF INSURED BUILDING—CAUSE—EVIDENCE—SETTING ASIDE VERDICT.

   In an action on a fire policy which provided that the insurance should terminate if the building should fall, except as the result of fire, evidence examined, and *held* not only to warrant a finding by the jury that the fall of the building was caused by fire, but to preclude the setting aside of such finding as against the weight of the evidence.

2. SAME—APPEAL—HARMLESS ERROR.

   In an action on a fire policy providing that the insurer should not be liable for any loss caused by explosion unless fire should ensue, and then only for the damage by fire, and that the liability of the company should cease if the building should fall, except as the result of fire, the jury found the company liable for its stipulated proportion of the total loss. *Held*, that as this finding necessarily involved a determination that the fall of the building was caused by fire, and not by an explosion, error, if any, in submitting to the jury the question of whether the building fell as the result of an explosion, as well as in admitting testimony as to the proportion of the loss caused by fire, on the assumption that there had been an explosion, was harmless.

3. SAME—BURDEN OF PROOF.

   A provision in a fire policy that if the building containing the insured property should fall, except as the result of fire, the insurance should immediately cease, was a condition subsequent, so that in an action on such policy to recover for the destruction of the property by fire, in which it appeared that

[1]Rehearing denied June 23, 1903.

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the building fell, the burden was on the insurer to prove, as a defense, that it fell from some other cause than fire.

4. EVIDENCE—EXPERT TESTIMONY.
A hypothetical question detailing the method adopted to remodel and improve the interior of a building, and asking if witness thought such construction safe, was not objectionable as not a proper subject for expert testimony.

5. SAME—APPEAL—OBJECTIONS.
Where a hypothetical question was objected to below merely on the ground that it did not state facts sufficient to enable the witness to give an intelligent opinion, and that it was not a proper subject for expert testimony, an objection that it omitted certain facts which should have been stated, and assumed some facts not proved, could not be raised on appeal.

6. SAME—CAUSE OF FALL OF BUILDING.
Upon an issue as to whether the fall of an insured building was caused by fire, in which there was evidence that fire was seen to issue from the building prior to its fall, and that the construction of the building was safe, expert testimony by contractors and builders that a fire which burned off the ceiling or floor joists would occasion the fall of the building in the manner in which it fell was not objectionable as assuming facts not in evidence.

7. SAME.
The matter was a proper subject for expert testimony.

Error to Kent; Perkins, J. Submitted January 16, 1903. (Docket No. 54.) Decided May 12, 1903.

Assumpsit by the N. & M. Friedman Company against the Atlas Assurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Crane, Norris & Drew (*Russell C. Ostrander*, of counsel), for appellant.

Knappen, Kleinhans & Knappen, *G. A. Wolf*, and *J. H. Tatem*, for appellee.

CARPENTER, J. In the court below, plaintiff recovered a verdict and judgment against the defendant for loss

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under an insurance policy. This policy was a Michigan standard policy. It bore date August 31, 1900, and, for the term of one year from September 10, 1900, insured plaintiff, to an amount not exceeding $2,000, on its stock of merchandise, situated at Nos. 70 and 72 Monroe street, Grand Rapids, Mich. The policy contained these clauses:

"Other concurrent insurance permitted."

"This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance."

"This company shall not be liable for loss caused directly or indirectly by invasion, * * * or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind."

"If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

At 10 minutes to 2 on the morning of July 18, 1901, about half of the building which contained plaintiff's stock of goods fell to the ground. The larger portion of the stock was carried with it. At 3 o'clock it was discovered that the ruins were on fire, and the fire thus discovered consumed practically all the stock insured. Plaintiff had other insurance upon the property destroyed, which, together with that of the defendant, amounted to $100,000, so that defendant, under the terms of its policy, was liable for one-fiftieth of the loss covered by the policy.

Upon the trial in the court below, plaintiff insisted that the fall of the building was caused by fire. Defendant denied this. This issue was submitted to the jury. Plaintiff also insisted that the evidence warranted the jury in finding that the building fell in consequence of an explosion not directly caused by fire, and that, if they did so find, defendant would be responsible for its proportion of so much of the destruction of goods as was caused by the subsequent fire, which, according to plaintiff's testimony, would be about 95 per cent. of the total loss. Defendant denied that the evidence warranted any such finding.

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This issue was submitted to the jury. The court charged the jury that, it being conceded that the stock was destroyed by fire, the burden rested upon the defendant to prove that the building fell from some other cause than fire. The jury rendered a verdict for $1,982.55, which was one-fiftieth of the plaintiff's total loss.

Defendant asks a reversal of the judgment on these grounds:

(1) That there was no evidence from which the jury could find that the fall of the building was caused by fire.
(2) That their finding that it was so caused was so against the weight of the evidence that it should be set aside.
(3) That the evidence did not warrant submitting to the jury the question of whether the fall of the building was caused by an explosion.
(4) That the court erred in charging that the burden of proof rested upon the defendant to show that fire did not cause the building to fall.
(5) That the court erred in admitting in evidence certain expert testimony.

We will proceed to discuss each of these questions.

1. Did the evidence warrant the jury in finding that the fall of the building was caused by fire?
2. Was their finding that it was so caused against the weight of the evidence?

These questions are so related that they will be considered together.

It may be taken as established by the testimony that immediately after the building fell, and for more than an hour thereafter, there was no appearance of fire in or about the ruins. There was no flame or smoke arising from the *débris*. No charred timbers or embers were visible. It appears, too, that plaintiff had been remodeling and improving the interior of its store, and had cut into and removed some of the partition walls in such a way as to afford evidence that it had thereby weakened the building. If we looked at these circumstances alone, the inference that fire did not cause the building to fall would

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be very strong. On the other hand, plaintiff produced before the jury no less than six witnesses who testified that, before the building fell, they saw a flame of fire—some of them spoke of it as a red sheet of flame—shoot up from the top of the building. Defendant insists that this testimony should be disregarded, for several reasons:

(*a*) That it is inconsistent with the testimony of other observers. It is true that this testimony is not in accord with that of several witnesses for the defendant. It may be said, however, that, of the witnesses who gave opposing testimony, only three were in a position to have observed this flame, had it been visible as plaintiff's witnesses testify.

(*b*) That this testimony is inconsistent with the fact that the ruins showed no appearance of fire for more than an hour. There is testimony tending to prove that the contents of the building were covered, after it fell, by mortar and brick. It is the theory of the plaintiff that the fire which occasioned the fall of the building was thus retarded and concealed for more than an hour after the building fell. This court cannot say that that theory was unsound, especially as there were placed before the jury instances where fire was concealed for some hours under conditions somewhat similar.

(*c*) That the fire which these witnesses described did not come from the top of the building before it fell, but was the flash occasioned by the building itself, during its fall, striking the electric-light wires. We cannot accept this hypothesis without discrediting the testimony of the witnesses. They say it did come from the top of the building, and that it did precede the fall, and several of them testify that they saw these electric-light flashes after they saw the blaze shoot from the top of the building.

(*d*) That the witnesses who gave this testimony should not be believed, for various reasons: That several of them could not have seen this blaze from their location. This does not so clearly appear that we are authorized to accept this argument. One of them, who was traveling on the street, attempts to locate his position, and says he

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was "about" at a certain point. Granting it to be true that, if he had been exactly at that point, he could not have seen, we have no right, in examining his testimony, to believe, when he said "about," that he meant to be exact,—particularly when, as a result, it leads to our discrediting his entire testimony.

(*e*) It is said that some of these witnesses should be discredited because some of their testimony is contradictory or inconsistent with former statements. If this were true of all of plaintiff's witnesses, it would present a strong argument in favor of setting aside the verdict because against the weight of the testimony. But it is not true of all of them.

It is our judgment, therefore, that not only was there evidence upon this issue to submit to the jury, but that their verdict thereon should not be set aside because it was against the weight of the evidence.

3. Did the evidence warrant the court in submitting to the jury plaintiff's claim that the building fell in consequence of an explosion? In our judgment, we need not discuss this question. The verdict of the jury was for one-fiftieth of the entire amount, and not for one-fiftieth of a smaller amount, as it would have been had they found that the building fell because of an explosion. In other words, the amount of the verdict proves that the jury found that the building fell in consequence of fire.

4. Did the court err in charging the jury that, plaintiff's stock having been destroyed by fire, the burden of proving that the fall of the building was not occasioned by fire was thereby transferred to defendant? This precise question was adjudicated in *Western Assurance Co.* v. *J. H. Mohlman Co.*, 28 C. C. A. 157, 83 Fed. 811, 40 L. R. A. 561. The policy in that case was exactly like the policy before us, except in amount, name of insured, and description of property. It appears from the statement of facts that the insurance covered a stock of groceries and merchandise "while contained in brick building Nos. 38–40 North Moore street and 156 Franklin street. On April 30,

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1895, the property insured was destroyed by fire. At or about the time of the fire the building fell, and the issue of fact in the case was whether the fall preceded the fire, or was itself the result of the fire. Upon this issue the testimony was conflicting, and the verdict of the jury was adverse to the insurance company." The opinion in the case, written by Circuit Judge Lacombe, and concurred in by his associates, Circuit Judge Shipman and Mr. Justice Peckham, of the Supreme Court of the United States, is so applicable to this case, and so instructive in its reasoning and discussion of authorities, that we quote at length therefrom:

"The trial judge charged the jury that the burden of proof rested upon the defendant (the insurance company) to show, by a preponderance of evidence, that 'the fall preceded the fire;' that 'this building did not fall as the result of fire.' Exceptions to the charge, and to refusals to charge the converse of this proposition, sufficiently present the question of the correctness of this ruling. It will not be necessary to repeat the text either of the charge or of the requests. The trial judge construed the clause referring to a fall of the building as a proviso or condition subsequent, defeating any claim of the insured. If it be such, no one here disputes the proposition that the burden of proving the happening of the subsequent condition would rest upon the insurer. The defendant, however, contends that the clause is an exception to the general liability assumed by the insurance company, and that, therefore, it was for the insured to show that the loss did not come within the terms of the exception.

"The general rule is well expressed by Earl, J., in *Slocovich* v. *Insurance Company*, 108 N. Y. 56 (14 N. E. 802):

"'Where there is an insurance against a loss by fire, and it is proved or admitted that the property insured has been destroyed by fire, the loss is brought literally and exactly within the terms of the policy. If, in such a case, the insurance company claims to be exempt from paying the sum insured, because there has been a breach of some condition contained in the policy, or the violation of some obligation or duty imposed upon the insured by the law or contract, the burden rests upon it to establish the facts which it thus relies upon as a defense to the claim under the policy.'

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"The diligence of counsel has presented a long array of authorities bearing upon this assignment of error. The question has been expressly decided in accordance with defendant's contention in *Pelican Ins. Co.* v. *Troy Co-op. Ass'n*, 77 Tex. 225 (13 S. W. 980), and *Phœnix Ins. Co.* v. *Boren*, 83 Tex. 97 (18 S. W. 484), and in accordance with plaintiff's contention in *Transatlantic Fire-Ins. Co.* v. *Bamberger*, (Ky.) 11 S. W. 595, in *Blasingame* v. *Insurance Co.*, 75 Cal. 633 (17 Pac. 925), and in *Insurance Co.* v. *Crunk*, 91 Tenn. 376 (23 S. W. 140).

"In the Texas case the policy contained the following provisions:

" '(1) This company shall not be liable for any loss or damage by fire caused by means of hurricane.

" '(2) If the building shall fall, except as the result of fire, all insurance of this company on it or its contents shall immediately cease and determine.'

"The fire occurred during or immediately following a severe hurricane, which at least partially blew the house down, and there was evidence tending strongly to show that the fire had its origin in the breaking of a lamp by falling timbers. The court held:

" 'The provisions of the policy above noticed are exceptions to the general liability assumed by appellant, and the petition should have averred that the fire did not occur from one of the excepted causes. This was necessary to show a cause of action, for the company did not insure against loss resulting from a fire caused by a hurricane, nor were its policies binding at all for a loss caused by fire occurring after the fall of the house, unless the fall was caused by fire.'

"In the Kentucky case the policy contained this clause:

" 'This company shall not be liable under this policy for loss and damage if the building herein described, or any part thereof, fall, except as the result of fire.'

"The jury were instructed that defendant was not liable for any loss or damage, if the building fell, unless the fall was the result of fire, and that:

" 'The burden is upon the defendant to show by the evidence that the building, or such part thereof as fell, * * * did not fall as the result of fire; and unless the jury believe from the evidence that the said building, or such part thereof as fell, did not fall as the result of fire, they should find for the plaintiffs.'

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"These instructions were approved by the appellate court.

"In the California case the policy provided that the company should not be liable for 'loss caused by the falling of any building insured or containing property insured by this policy, or by fire ensuing therefrom.' The complainant alleged that all of the property was totally destroyed by fire, but it was not alleged that the loss was not caused by any of the excepted causes. The complaint was demurred to on the ground that it contained no such allegation, and the demurrer was overruled. On appeal the supreme court sustained the judgment overruling the demurrer, saying:

"'One seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against; but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks.'

"In the Tennessee case the policy provided that:

"'If the building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.'

"The defendant demurred on the ground that there was no averment in the declaration that the building insured, or any part thereof, did not fall except as the result of fire. The demurrer was overruled, and the supreme court, affirming such decision, says:

"'It is not necessary that it should have averred the performance or nonperformance of conditions subsequent, nor to have negatived prohibited acts or excepted risks.'

"The burden of proof has been held to rest upon the defendant under other similar clauses of fire policies; *i. e.*, clauses restricting in some way the liability of the insurer. So, where it was provided that the policy should be void in the event of the insured effecting additional insurance (*Clark* v. *Insurance Co.*, 9 Gray, 148; *Russell* v. *Insurance Co.*, 84 Iowa, 93 [50 N. W. 546]); also where it is provided that the policy should be void if the property was allowed to remain vacant beyond a limited time (*Bittinger* v. *Insurance Co.*, 24 Fed. 549); where there was a provision that the policy was executed by the agent and delivered to the insured upon the condition that it should

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not become effective until it was approved by the home office (*Young* v. *Insurance Co.*, 59 Conn. 41 [22 Atl. 32]); and where it was provided that the company should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, etc. (*Portsmouth Ins. Co.* v. *Reynolds*, 32 Grat. 613).

"A clause to the effect that the insurer should not be answerable for loss by fire which should happen by any explosion is referred to in two cases cited by defendant (*Hayward* v. *Insurance Co.*, 7 Bosw. 385, 2 Abb. Dec. 349, and *St. John* v. *Insurance Co.*, 1 Duer, 371, 11 N. Y. 516) as 'an exception to the general language of the previous clause, by which they promise to make good such loss or damage as shall be occasioned by fire.' But the point here raised was not before the court. It was conceded in both cases that the fire was the result of an explosion, and the word 'exception' is used in the opinions evidently not in its technical sense, as contrasted with 'conditions,' but as a convenient way of expressing the fact that the insurer under such a policy would not be liable for all losses by fire. This seems clearly indicated by the sentence from 11 N. Y. 518:

"'Hence a loss occasioned by invasion, insurrection, riot, and the like, has usually been found excepted in such policies; and, although in this, and perhaps in policies generally, the exception in this respect is in terms of losses by fire, the clause would be equally definite and intelligible if those words were omitted in the clause stating the exception.'

"The academic distinction between an exception and a proviso is thus stated in Bouvier, Law Dict.:

"'An exception exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse.'

"It may not be always easy to apply this distinction in practice (witness the conflicting decisions *supra*), but no especial help to the solution of the problem is to be derived from cases holding, as do some of those cited on the brief, that, when the insurance is against 'perils of the sea,' the burden is upon the insured to show that such perils caused the loss; or that where insurers engage to be responsible

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for partial loss only if it amounts to five per cent., or the ship be stranded, the insured must show loss to the specified percentage, or that the ship was stranded; nor that, under bills of lading providing that the carrier should not be liable for loss by fire while in transit, plaintiff, if he seeks to recover for a fire resulting from the carrier's negligence, must show that negligence affirmatively; nor that, under a policy insuring against injuries effected through external, violent, and accidental means, the burden is upon the plaintiff to show from all the evidence that the death was caused by external, violent, and accidental means. *Baker* v. *Insurance Co.*, 12 Gray, 603; *Paddock* v. *Insurance Co.*, 104 Mass. 521; *Union Ins. Co.* v. *Shaw*, 2 Dill. 14 (Fed. Cas. No. 14,366); *The Neptune*, 6 Blatchf. 193 (Fed. Cas. No. 10,118); *Whitworth* v. *Railway Co.*, 87 N. Y. 413; *Kaiser* v. *Latimer*, 9 App. Div. 37 (41 N. Y. Supp. 94); *Claflin* v. *Meyer*, 75 N. Y. 260 (31 Am. Rep. 467); *Lamb* v. *Transportation Co.*, 46 N. Y. 271 (7 Am. Rep. 327); *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661 (8 Sup. Ct. 1360).

"A pertinent case cited on the brief of plaintiff in error is *Sohier* v. *Insurance Co.*, 11 Allen, 336. The policy in that case insured Sohier, in the language of the opinion,—

"'Against loss or damage by fire to the amount of *$2,500 on his brick and slated building known as the "National Theater," situate on Portland street, Boston, Mass. This policy not to cover any loss or damage by fire which may originate in the theater proper.*'

"Some provisos against liability for loss by fire which happens by invasion, riot, and the like, are in a later part of the policy. The clause in italics is written in the policy, the rest of the parts quoted being printed. The opinion proceeds (the italics *infra* being our own):

"'The first question raised by the bill of exceptions is whether the burden of proof was on the plaintiff to show a loss by fire which did not originate in the theater proper. This depends upon the construction given to the clause, "This policy not to cover any loss or damage by fire which may originate in the theater proper." If that clause can be regarded as a *proviso*,—that is, *a stipulation added to the principal contract, to avoid the defendants' promise by way of defeasance or excuse*,—then it is for the defendants to plead it in defense and support it by evidence; but if, on the other hand, it is an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always

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easy to determine to which class—whether of provisos or exceptions—a particular stipulation belongs; and *this one is certainly very near the line.* But, after a careful consideration, the court are of opinion that this was an exception to the subject of the contract; that it put the burden of proof on the plaintiff. * * * The qualification of the contract to which the parties agreed is not inserted with any technical formality or precision. But *it is found between the statement of what is insured and the promise to pay in case of loss, in close connection with, and qualification of, the description of the subject-matter* of the insurance. *The provisos are set forth together in a different part of the instrument.* It thus seems to be a direct limitation of the risk against which insurance is effected. The difference would only be a formal one, if, instead of the phraseology actually used, the language of the policy had been, "do insure against loss or damage by fire not originating in the theater proper." It would illustrate the operation of the phrase in question, and show its effect as an exception, if we suppose it applied to the building insured. If the clause in the policy had been, "This policy not to cover any loss or damage by fire to the part of the building used as a theater proper," * * * this would manifestly have been an exception from the subject matter of the insurance. And it is in like manner an exception to the risks taken by defendants, *when, in the same part of the policy in which they insure the risk of fire, and in the same connection,* they state, in substance, that it is only fire which does not originate in the theater proper against which they insure.'

"A similar question has been before the courts in actions upon policies of life insurance, where the contract sued upon contained a clause that it was to be void if insured died of a disease induced or aggravated by intemperance, or was to be null and void if he should die in, or in consequence of, a duel, or in violation of the laws of any nation, state, or province, or where the clause read, 'The self-destruction of the person [insured], whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in the contract.' In each of these cases it was held that the clause contained a condition, and that it was for defendant to show its breach by a fair preponderance of proof. *Van Valkenburgh* v. *Insurance Co.*, 70 N. Y. 605; *Murray* v. *Insurance Co.*, 85 N. Y. 236; *Goldschmidt* v. *Insurance Co.*, 110 N. Y. 628 (17 N. E. 871). And a similar rule of construction has been applied in cases of accident insurance, where the contract provided that the insurance should not extend to cover accidental injuries or

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death caused by fighting or voluntary exposure to unnecessary danger, nor while the insured was under the influence of intoxicating drinks. See *Jones* v. *Accident Ass'n*, 92 Iowa, 652 (61 N. W. 485), where the court says:

"'Not one of these conditions was to happen prior to the time the contract between the assured and the company should become binding. * * * The situation, then, is this: That there was a valid contract of insurance when the policy issued, but it might thereafter, upon the happening of some of these conditions, cease to be enforceable. * * * They were each and all matters of defense available to the defendant, but, not constituting a part of the plaintiff's case, the burden did not rest upon him either to plead or prove the absence of them in the first instance.'

"And in *Coburn* v. *Insurance Co.*, 145 Mass. 226 (13 N. E. 604), where there was a similar ruling, the court uses this language:

"'Stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense, and must be sustained by evidence. They are in the nature of provisos. Exceptions, which leave the defendant liable to perform that which remains after the part excepted is taken away, are to be negatived.'

"Some remarks of the court in *Freeman* v. *Insurance Co.*, 144 Mass. 572 (12 N. E. 372), are most pertinent to the case at bar. The policy insured against bodily injuries 'effected through external, violent, and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed.' After the principal clause followed five provisos and eight conditions. The second proviso was, '*Provided*, always, that this policy is issued and accepted subject to all the provisions herein contained or referred to.' The third proviso was, 'That this insurance shall not extend to any bodily injury * * * when * * * injury may have happened in consequence of * * * voluntary exposure to unnecessary danger.' The first condition was, 'The party insured is required to use all due diligence for personal safety,' etc. The last condition provided, 'The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this policy, are conditions precedent to the making of this contract.' The question presented on appeal was whether the burden of proof was on the plaintiff to show that the insured used 'all due diligence for personal safety and protection.' The court says:

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"'The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition, is stated in *Com.* v. *Hart*, 11 Cush. 130, 134, as follows:

"'"If such instrument contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception."

"'It is a general rule of the law of evidence that it is necessary for a party to prove the substantive facts which he is required affirmatively to aver in his pleading.

"'It is true that the policy in the case at bar only insures against bodily injuries effected by the means described "within the intent and meaning of this contract, and the conditions hereunto annexed;" but this does not change the nature of the conditions. They still take effect as conditions, and the insertion of these words in the principal clause of the contract does not vary the legal effect of the contract. The condition we are considering is essentially an executory stipulation, in the form of a condition, that Murray shall use all due diligence for his personal safety and protection, and it is the breach of this condition by Murray which the defendant sets up as a defense. We are not aware that it has ever been held that the introduction of the words we have quoted, or of other similar words, into the principal clause of a policy of insurance, incorporates into this clause the conditions of the policy, within the meaning of the rule of pleading we have stated; and in some of the decisions where it has been held that the defendant must plead, or that the burden of proof was on him to show, that a representation was false, or that a stipulation contained in a condition had not been complied with, the policy contained these or similar words in the principal clause. * * * In an action upon a policy which contains many provisos and conditions, there is a practical wisdom, which courts have recognized, in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies.'

"Examined in the light of these authorities, the clause providing what shall happen in the event of a fall is not difficult of construction. It is not in that part of the policy which insures the risk, nor 'in close connection with, and qualification of, the description of the subject-matter of the insurance,' but is placed with the other provisos, in a different part of the instrument. The mere location of

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the clause is, of course, not controlling, but it has been considered as of some weight in several of the cases cited *supra*. Nor is it to be construed as if it were removed from its position among the provisos, and incorporated with the clause descriptive of the subject-matter, by the mere use of the words, 'except as hereinafter provided.' To give these words such an effect would be to incorporate with the descriptive clause all the provisos as to loss caused directly or indirectly by riot or invasion, or by neglect of the insured, or by explosion or lightning, or where there has been other insurance (not notified to company), or where manufacturing is carried on after 10 p. m., or the building stands vacant, etc. The overwhelming weight of authority, as will be seen from the citations *supra*, is opposed to any such construction.

"The most important element, however, in determining whether a particular clause expresses a condition or an exception, is the nature of the clause itself. What does this particular clause mean, 'If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease?' Manifestly, it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from a fall. It stipulates for very much more, viz., that the contract, which it is expressly provided shall normally continue for a year, shall, in the event of a fall, absolutely cease and determine, so that, if a fall shall take place which in no way injures the property insured, and it be thereafter destroyed by fire happening otherwise than by fall or from prohibited causes, the insurer is nevertheless not liable, because an event has happened which, by agreement of the parties, puts an end to the contract altogether. It is difficult to see how such a clause can be construed otherwise than as a condition subsequent.

"To the further argument that the words in the descriptive clause, 'while contained in brick building,' etc., made it necessary for the plaintiff to show that no fall had destroyed the integrity of the building, a sufficient answer is found in the brief of the defendant in error. A clause drawn expressly to cover the case of a building falling before a fire has been inserted in the contract, and it is to be assumed that the whole intention of the parties on that subject is expressed in such clause."

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We cannot agree with defendant's counsel that the foregoing decision is inapplicable to the case at bar. It is true, in that case the fire happened at or about the time the building fell, and in this case the fire was not visible until one hour and ten minutes after its fall. Nevertheless, the fact that the property insured was destroyed by fire brought the loss within the terms of the policy, and, under the principle of that decision, placed upon the defendant the burden of proving a breach of a condition in the policy, relieving it from liability. Nor can we agree with them that the decision is contrary to the weight of authority. Defendant's counsel have brought to our attention no case which, in our judgment, has a material bearing on the question under discussion, which is not considered and discussed in the *Mohlman Case*. While they have been able to point out inaccuracies in the analysis of some of the cases in that opinion, they have shown no such inaccuracy as sensibly impairs its authority. We believe that its reasoning and its analysis of authorities, which we heartily approve, answers every objection raised by defendant's counsel to the question now under consideration.

5. The expert evidence complained of was of three classes:

(*a*) On the assumption that the loss was occasioned by an explosion, Morris Friedman, a witness for the plaintiff, was permitted to give an estimate of the proportion of the loss caused by fire and the proportion caused by the fall of the building. This testimony would have been serviceable to the jury in the event of their finding that explosion, and not fire, caused the building to fall, and in that event only. Since the jury found, as we have before indicated, that fire did cause the fall of the building, this testimony could not have been used or considered by the jury, and therefore its admission, if erroneous, which we do not undertake to determine, was not harmful.

(*b*) An experienced contractor and builder, introduced as a witness by the plaintiff, was permitted, in answer to

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a hypothetical question detailing the method adopted to remodel and improve the interior of the said building, to state that he thought the construction was perfectly safe. Defendant's counsel objected and excepted because the question "does not state any facts sufficient to enable the witness to give an intelligent opinion; that it is not a subject for expert testimony; and on the ground that it is the very question which the jury is to pass upon in this case." It is now claimed that there were omitted from this question certain facts which should have been stated, and that it assumed some facts not proved. We think the court properly overruled the objections made, and it is useless to cite authorities in support of the proposition that no other objection can be made on the hearing in this court.

(*c*) Plaintiff was permitted to put before the jury the opinion of contractors and builders that a fire which burned off the ceiling joists or floor joists would occasion the fall of the building in the manner in which it fell, against the defendant's objection that "it is not a proper subject for expert testimony, and the witness is not qualified to give his opinion. It is immaterial and incompetent. It is the very question for the jury to determine. The question assumes facts which are not in evidence,—not shown by evidence." We do not think that the objection that the question assumed facts not in evidence is valid. If the jury believed plaintiff's testimony that, almost immediately before the building fell, a flame or blaze shot up from this part of the building, and that the method for remodeling the store was safe, they would be warranted in inferring that this fire had burned some part of the building which occasioned its fall. Whether that part were the joists referred to in these questions would depend upon many probabilities, the most important of which would be the tendency of their destruction to occasion said fall. This tendency was a proper subject for the testimony of experts familiar with the construction of the building, as these witnesses were. In our judgment, therefore,

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this testimony was proper and helpful to the jury, and there was no error in its admission.

As we find no reversible error in the record, the judgment of the court below will be affirmed.

The other Justices concurred.

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GOODWIN v. HAMPTON TRANSPORTATION CO.

CORPORATE STOCK — INDORSEMENT — BANKRUPTCY SALE — BONA FIDE PURCHASER.

A purchaser of corporate stock at bankruptcy sale, who took with notice that such stock had been given by the bankrupt to his daughter, and that the latter's subsequent indorsement and return of the certificate thereof to her father was to enable it to be pledged for corporate debts, could not hold the stock as against the daughter.

Appeal from Bay; Connine, J., presiding. Submitted February 18, 1903. (Docket No. 89.) Decided May 12, 1903.

Bill by Grace E. Goodwin against the Hampton Transportation Company and Benjamin Boutell for an accounting. From a decree for complainant, defendants appeal. Affirmed.

McDonell & Duffy, for complainant.

T. A. E. & J. C. Weadock, for defendants.

MONTGOMERY, J. This is an appeal from a decree of the circuit court for the county of Bay in chancery, in which an accounting was had, and a determination that complainant was entitled to the sum of $7,576.11 as her interest in the earnings and proceeds of the sale of the

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steamer C. A. Eddy. No exceptions were filed to the findings on the accounting, and the only question which need be discussed is whether the complainant was the owner of the interest in the vessel claimed by her.

In 1895 the steamer C. A. Eddy was owned by the Hampton Transportation Company, the stock of which was owned principally by F. W. Wheeler. The defendant Benjamin Boutell purchased the steamer, and directly afterwards Spencer O. Fisher purchased a one-half interest from Boutell. The parties then devised the scheme of continuing the corporate existence of the Hampton Transportation Company, and the previous owners of the stock transferred to Fisher, Boutell, and their associates all the stock of the corporation, and this stock was placed as follows: With Spencer O. Fisher, 399 shares; Benjamin Boutell, 300 shares; Grace E. Fisher (the present complainant), 100 shares; William H. Boutell, 100 shares; Fred E. Boutell, 100 shares; and Alvah E. Lockwood, 1 share. A meeting of the stockholders was then held, and the above-named persons were elected directors. At the same meeting, on motion of the defendant Boutell, the ownership in the shares of stock was declared to be as above stated.

At the time of the purchase but $5,000 cash was advanced, the remainder of the purchase price being obligations of the company assumed by the purchasers; the $5,000 being advanced in equal proportions by Boutell and Fisher, they receiving credit upon the books of the company. Stock certificates were issued to the respective holders of stock as above stated, the complainant receiving her certificate for 100 shares, and retaining it in her possession until August, 1898. At this time the corporation was indebted to James S. Galloway in the sum of $21,500, and desired a further advance of $7,500. Mr. Galloway insisted, as a condition to advancing this further sum, that all the stock of the company be placed in his hands as collateral to secure the entire loan. The complainant testifies that this demand was made known to her

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by her father, Spencer O. Fisher, and that, for the purpose of complying with this requirement, she indorsed her certificate in blank, and handed it to her father. The defendant Boutell also procured the stock held by his two sons, indorsed in like manner, and they met for the purpose of turning the stock over to Mr. Galloway. Mr. Spencer O. Fisher also for some reason placed his own indorsement upon complainant's stock, and the stock thus assembled was placed in the hands of Mr. Galloway as security, and was retained by him until October, 1900.

In the meantime Mr. Fisher was forced into bankruptcy, and in his petition there was listed stock in the Hampton Transportation Company $25,000. Hon. T. F. Shepard testifies that this was probably a mistake of Mr. Fisher, but the circumstances are not very clearly explained. At a subsequent sale of the assets of the bankrupt the defendant Boutell became the purchaser of this stock as the stock of the bankrupt, at the same time entering into an agreement with Mr. Fisher which in part provided for a repayment of the price bid out of the earnings of the vessel. This is a fact which might be of considerable significance if we were convinced that Mr. Boutell would otherwise be a good-faith purchaser. The defendant Boutell contends that he is such good-faith purchaser, relying upon the rule asserted in *McLean* v. *Medicine Co.*, 96 Mich. 479 (56 N. W. 68), that the purchaser of stock for value will be protected as against the latent equities of one who indorses in blank, and thus invests the custodian with evidence of title.

We think the case is not one in which the defendant Boutell occupies a position which entitles him to invoke this rule. There can be no doubt that the placing of this stock in the complainant's name in the first instance was a completed gift; nor is there any doubt that all the parties, including Mr. Boutell, knew this fact. By his own motion the ownership was formally declared to be in complainant. We do not overlook the suggestion that the stock was placed in complainant's hands for the purpose of making up a board of directors. But it is significant that, when

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this was the only purpose, Mr. Fisher deemed it sufficient to part with one share, as in the case of Lockwood. Boutell, having notice of complainant's ownership, also had notice that the purpose of this transfer was to assemble the stock for the purpose of placing the same with Mr. Galloway as collateral. In other words, he knew that complainant did with her stock precisely as he did with his own to effectuate the same purpose. These circumstances repel any inference which he might otherwise have drawn that the indorsement in blank was for the purpose of transferring title. The finding of the circuit judge was fully justified.

The decree will be affirmed, with costs of both courts to complainant.

The other Justices concurred.

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GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN *v.* FRANK.

BENEFIT SOCIETIES — CERTIFICATE — INTEREST OF BENEFICIARY — RIGHT TO CONTEST SURRENDER.

The beneficiary named in a mutual benefit certificate has such an interest therein that he may, after the death of the insured, contest the validity of the latter's action in surrendering the certificate, and procuring a new one, payable to a different beneficiary, on the ground that he was mentally incompetent to bring about that result; and, if such claim be established, the original certificate will be held to have remained in force.

Appeal from Wayne; Donovan, J. Submitted April 10, 1903. (Docket No. 30.) Decided May 12, 1903.

Bill of interpleader by the Grand Lodge of the Ancient Order of United Workmen against Lewis M. Frank and

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Anna Estella Frank to determine the right to the proceeds of a benefit certificate. Defendant Anna Estella Frank filed an answer in the nature of a cross-bill, to which defendant Lewis M. Frank demurred; and from an order overruling the demurrer he appeals. Affirmed.

Haug & Yerkes, for defendant Anna Estella Frank.

Thomas S. Parker (*Allan H. Frazer*, of counsel), for appellant.

MONTGOMERY, J. Charles P. Frank, a resident of Detroit, died on the 5th day of February, 1902, leaving at the time of his death, as his heirs at law, his wife, Anna Estella Frank, and his father, Lewis M. Frank. On April 8, 1887, Charles P. Frank took out a beneficiary certificate for $2,000 in the Ancient Order of United Workmen; making his wife, A. Estella Frank (Anna Estalla Frank), the beneficiary thereunder. The present bill is a bill of interpleader, setting out that on July 20, 1898, Charles P. Frank surrendered the beneficiary certificate, and took out a new one, payable to his mother, Elizabeth V. Simonton; that Mrs. Simonton died in January, 1900, and Charles P. Frank died in February, 1902. The bill further sets out that the heirs at law of Charles P. Frank are the defendants, Lewis M. Frank and Anna Estella Frank. In her answer in the nature of a cross-bill, Anna Estella Frank avers that the attempted surrender of the certificate by Charles P. Frank, and the designation of the new beneficiary, made in July, 1898, were made at a time when Charles P. Frank was insane and mentally incompetent, and asked to have this fact so decreed, and that the attempted change of beneficiary be decreed to be null and void, and that the insurance money due be decreed to be paid to her. To this answer Lewis M. Frank demurred on the ground that the pleadings do not set up a right in defendant Anna Estalla Frank to which the court can apply a remedy, and that she had no vested interest in the beneficiary certificate, and was not a party to the contract, and

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is not entitled to raise the question of the insanity of Charles P. Frank.

The answer sets up all the facts necessary to an understanding of the case, and shows the defendant Anna Estella Frank entitled to the relief which she prays, unless it be held that she had no such interest in the subject-matter as entitled her to raise the question of Charles P. Frank's mental incompetency. It is true that, as the beneficiary named in this certificate, she had no vested interest in the certificate of Charles P. Frank prior to his death; but she had a contingent interest, which vested at his death, and, unless there is some imperative rule of law which precludes her from raising the question of his mental capacity, it should be held that she has the right to intervene in this manner. It is the contention of the counsel for Lewis M. Frank that only Charles P. Frank himself, or his heirs at law, could raise the question of his mental incapacity. It is said that the transfer was not void, but voidable, and that the option of voiding it rests only with one having an interest; that during his lifetime Charles P. Frank had such interest; and that at his death his heirs at law are the only ones who had such interest. If this be the correct view, it must rest upon the ground that the heirs at law or representatives were entitled to raise the question because the right is devolved upon them under the statute of distribution or descent, and that one occupying the position of beneficiary, named by the voluntary act of Charles P. Frank, does not stand upon the same vantage ground.

We think this distinction cannot be supported in reason or authority. It has been frequently held that the heirs at law may intervene in such cases after the death of the grantor to set aside a grant made by one mentally incompetent. *Peters* v. *Peters*, 101 Mich. 291 (59 N. W. 609); *Curtis* v. *Brownell*, 42 Mich. 165 (3 N. W. 936); *Rogers* v. *Blackwell*, 49 Mich. 192 (13 N. W. 512). In none of these cases had the party attacking the transaction any vested interest at the time of the alleged transfer. We

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think the better rule is that where such an attempt to change the beneficiary is made, and fails because of the want of mental capacity on the part of the insured, the original designation remains in force. *Elsey* v. *Odd Fellows Mut. Relief Ass'n*, 142 Mass. 224 (7 N. E. 844); *Smith* v. *Railroad Relief Ass'n*, 168 Mass. 213 (46 N. E. 626). A case quite in point is the recent one of *Ownby* v. *Supreme Lodge Knights of Honor*, 101 Tenn. 16 (46 S. W. 758).

The decree of the court below overruling the demurrer will be affirmed, with costs of this court, and the case remanded for further proceedings.

The other Justices concurred.

BURRELL v. CITY OF GREENVILLE.

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1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.
   Where a pedestrian steps near a hole in a sidewalk, and, solely on account of its wet condition, her foot slips into the hole and she is injured, there is no contributory negligence.

2. SAME—PROXIMATE CAUSE.
   In such case the pedestrian's slipping cannot be said to be the proximate cause of her injury, so as to relieve the municipality from liability.

Error to Montcalm; Davis, J. Submitted April 10, 1903. (Docket No. 32.) Decided May 12, 1903.

Case by Elizabeth A. Burrell against the city of Greenville for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff stepped into a hole upon the sidewalk of defendant city, and was injured. The negligence of the defend-

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ant is conceded. The sidewalk was old, rotten, and had several holes in it. Plaintiff had not lived in the city for eight months prior to the accident. She walked over the sidewalk to visit a neighbor. She had never gone over the sidewalk in question prior to that day. On the return from her visit, a drizzling rain having fallen and wet the planks, she stepped near one of the holes, into which her foot slipped. Plaintiff noticed the defects in the walk when she first went over it. The accident happened in daylight. She testified upon cross-examination that, if she had looked towards the hole, she thought she would have seen it, and that she did not think about the hole on her return. Defendant requested the court to direct a verdict for two reasons: (1) Because the undisputed evidence shows that the hole in the sidewalk complained of was not the proximate cause of the injury; (2) that the undisputed evidence shows that the plaintiff was guilty of contributory negligence. She recovered a verdict and judgment.

Edward J. Bowman (*M. A. Nichols*, of counsel), for appellant.

Charles L. Rarden (*N. O. Griswold* and *C. B. Rarden*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). 1. Counsel for defendant concede that, if the walk had not been slippery, plaintiff would have passed the hole without accident. This concession disposes of the contributory negligence of the plaintiff. The walk was constructed for her use. It was not negligence for her to walk upon it. The plank where she stepped was strong enough to support her. It was not negligence, therefore, for her to step there.

2. The slipping of plaintiff cannot be held to have been the proximate cause of the accident. Old and worn sidewalks become slippery when wet. Some sidewalks must necessarily incline more or less. Under such circumstances pedestrians, especially those who are old and feeble, are

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apt to slip. The statutory provision that sidewalks must be kept in a reasonably safe condition for travel, and which gives damages for a violation of the provision, does not cover alone cases where the traveler has stepped directly into the hole or defect, but where, in the exercise of ordinary diligence, he has stepped near it, and, without fault on his part, has slipped into it. The case is directly within the principle of the following authorities: *Alexander* v. *City of Big Rapids*, 76 Mich. 282 (42 N. W. 1071); *Germaine* v. *City of Muskegon*, 105 Mich. 213 (63 N. W. 78); *Shaw* v. *Township of Saline*, 113 Mich. 342 (71 N. W. 642).

Counsel for the defendant insist that the case is within *Beall* v. *Township of Athens*, 81 Mich. 536 (45 N. W. 1014). The roadbed in that case was good; the only negligence charged was its narrowness, and the neglect to place railings or barriers. The horse took fright at a log at the side of the road, and the driver struck him with the whip. These acts were held to be the proximate cause of the injury. In consequence of the fright of the horse, for which the defendant was in no sense liable, and the striking of the horse with the whip, the horse ran outside of the usually traveled portion of the highway. That case has no application to that where a traveler slips into a hole in the highway or sidewalk, while stepping where the law gives him the right to step.

Judgment affirmed.

The other Justices concurred.

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UPTON *v.* DENNIS.

1. PRINCIPAL AND AGENT—AUTHORITY—RATIFICATION.
   Ratification of the compromise of a claim by a collection agent cannot be based on a letter written by the creditor without full knowledge of the facts.

2. SAME—ESTATES OF DECEDENTS—DISCHARGE OF ADMINISTRATOR.
   Any authority conferred upon a collection agent by an administrator to compromise a claim belonging to the estate is terminated by the discharge of the administrator.

3. JUDGMENTS—COMPROMISE—CONSIDERATION.
   The discharge of a judgment on payment of less than the amount due thereon is void, for want of consideration, as to the amount remitted.

4. SAME—ESTATES OF DECEDENTS—LACHES—ESTOPPEL.
   In 1887, D. transferred his property to his wife to defeat the collection of a debt owing to complainant's intestate. Judgment was obtained in 1895, which was compromised soon thereafter, one C. assuming to act on behalf of the estate. Some two years afterwards complainant was appointed administrator (the estate being unrepresented in the meantime), and filed a bill to set aside the compromise as unauthorized. *Held*, that his right to maintain the suit could not be defeated on the ground of laches or estoppel, even though C., who negotiated the compromise, was the only creditor of the estate.

Appeal from Clinton; Stone, J. Submitted February 20, 1903. (Docket No. 108.) Decided May 12, 1903.

Bill by Josiah Upton, administrator of the estate of Amos W. Randolph, deceased, against William W. Dennis, Hiram M. High, and William H. Castle, to set aside the compromise of a judgment. From a decree dismissing the bill, complainant appeals. Reversed.

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Edwin H. Lyon and *H. J. Patterson*, for complainant.

Henry E. Walbridge, for defendant Dennis.

Norton & Dooling, for defendant High.

William H. Castle, in pro. per.

MONTGOMERY, J. In 1887 the firm of Westervelt & Dennis, composed of defendant Dennis and John W. Westervelt, became indebted to Amos W. Randolph in a sum in excess of $1,500. Westervelt died in November, 1887, and during the same month the defendant Dennis made over to his wife all the property which he possessed, amounting to something like $16,000, and from thence he represented that he had no property; that nothing could be collected of him. In 1891 Randolph commenced suit upon the claim against Dennis, as survivor of the firm of Westervelt & Dennis, which suit was pending at the time of Randolph's death, which occurred in 1891. In November, 1891, Mary A. Randolph was appointed administratrix of his estate in California, the place of his decease, and in August, 1892, indorsed the claim held by the estate to the defendant Castle for collection. Afterwards, in December, 1892, Mrs. Randolph was discharged as administratrix. Castle afterwards commenced suit on the notes and account in his own name, and finally recovered judgment on November 14, 1895, for $2,314.27 damages, and costs taxed at $217.98. On February 15, 1896, Dennis, and High, acting in his behalf, and Castle, assuming to act with authority, undertook to compromise the judgment, Dennis paying to Castle $1,750, and Castle making an assignment to High, reciting the receipt of but $1,200. Thereafter, on an application by Castle, the complainant was appointed the administrator of Randolph by the probate court of Clinton county, and this bill is filed for the purpose of having this alleged settlement declared ineffectual, and requiring the defendant Dennis to pay to complainant the balance of said judgment and costs. The

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defendant Castle, by an arrangement with Randolph in his lifetime, which was confirmed by the administratrix, was entitled to receive one-half of the amount received on this judgment for his compensation.

The circuit court dismissed the bill on the ground that Castle had full authority to make the settlement. We think that in this he was in error, for two reasons: *First.* The letter which he relied upon as conferring the authority was written by Mrs. Randolph after the attempted settlement was made, and was clearly not written with a knowledge of the facts as they existed. But, more than this, at the time she wrote this she had no power to bind the estate. She had been discharged as administratrix, and whatever power had been vested in Castle before that time by her must be deemed to have terminated upon her discharge as administratrix. Furthermore, there was no consideration for the discharge of the judgment for the excess.

It is contended by defendants' counsel that the complainant is not entitled to relief because guilty of laches in not attacking this transfer earlier, the transfer having been made in 1887. But in determining this question it is not to be overlooked that the defendant Dennis threw every obstacle possible in the way of the collection of this claim, and it was not until 1895 that the judgment was obtained, and since that time, and intervening that day and the appointment of the complainant as administrator, there was no one authorized to represent the heirs at law of Amos W. Randolph, deceased. This fact also answers the contention that there is an estoppel. It is also suggested that Castle, being the only alleged creditor of the estate, should be held estopped. But, even though there may not be other creditors, there are heirs interested in this estate and in the due administration thereof. The defendant Dennis had full knowledge that Castle was acting in a representative capacity. His own conduct was fraudulent throughout. He is in no position to appeal to this court for protection on the ground of estoppel, though

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he has failed to discharge this judgment, being abundantly able to pay it, for a sum much less than its face, and failed because of want of authority in Castle to make the compromise. He does not occupy a favorable position from which to appeal to a court of equity to enable him to reap the fruits of his attempted fraud.

We think the decree of the court below should be reversed, and one entered here in favor of the complainant against Dennis for the excess of the judgment over and above the $1,750 received, and defendant Castle to be required to account for the amount received, with interest, and that an accounting be had between him and the administrator. Complainant will recover costs of both courts.

HOOKER, C. J., CARPENTER and GRANT, JJ., concurred. MOORE, J., did not sit.

HANEY SCHOOL FURNITURE CO. v. SCHOOL DISTRICT NO. 1 OF CRYSTAL LAKE TOWNSHIP.

SCHOOL DISTRICTS—CONTRACTS—RATIFICATION—EVIDENCE—SUFFICIENCY—INTEREST—RIGHT TO RECOVER.

Defendant school district, through its moderator and director, entered into a written contract with plaintiff for a large quantity of school furniture. The goods were delivered, accepted, and used without objection, and payments made thereon. At the annual meeting following the execution of the contract, it was brought before the voters, and no objection made thereto. A warrant was issued and negotiated for the balance due under the contract, payable at a future day, with interest, and the principal sum was subsequently paid by the assessor out of the general fund of the district, and such payment approved by the district. *Held*, that, although there was no formal authorization of the contract, an adoption and ratification were established, so as to entitle plaintiff to recover the unpaid interest on the warrant.

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Error to Benzie; Chittenden, J. Submitted April 10, 1903. (Docket No. 36.) Decided May 12, 1903.

Assumpsit by the Haney School Furniture Company against school district No. 1 of Crystal Lake township to recover interest on a warrant issued by defendant. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

Plaintiff and defendant, through its moderator and director, entered into a written contract for 400 school desks and other articles, dated August 27, 1894. The plaintiff delivered the goods. They were accepted, and have remained in its possession and use to the present time without objection or complaint. The defendant paid the freight on a portion of the property, such freight being allowed as part payment upon the contract. The price agreed upon was $2,165.13. The first meeting held after this contract was executed was the annual school meeting on July 9, 1895, when the following motion was made:

"Moved by Mr. Warner, supported by Mr. Wood, that we raise $1,150 to make payment on school seats and furniture to Haney School Furniture Co. Motion lost."

Several payments were made by the district, and on September 11, 1895, the balance due was $1,099.25, for which a warrant was issued, payable February 1, 1896, with interest at 6 per cent. The warrant was subsequently assigned to the Old National Bank of Grand Rapids, Mich., was sent to the Benzie County Bank, at Frankfort, for collection, and the principal was paid by the assessor out of the general funds of the district. This suit was instituted to recover the interest, $174.01. The court directed verdict and judgment for the plaintiff.

N. A. Parker and *D. G. F. Warner*, for appellant.

Parm C. Gilbert, for appellee.

GRANT, J. (*after stating the facts*). The defense is that the school district had taken no affirmative action

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authorizing the contract in question, and this is conceded. We think that a formal authorization, under the undisputed facts, was not essential. The contract was made by the officers of the district. The furniture was delivered, accepted, and used. We think that it is conclusively established that the contract was adopted and ratified by the district. At the annual meeting following, this contract was brought before the voters of the district, and no objection was made to it. At the same meeting a committee of five was appointed to investigate the expenditure of moneys appropriated and expended, and report at some future time. It does not appear that any report was made. Payments were made, and finally a settlement was made, for which the warrant in suit was given. The entire principal was paid, and the payments reported to the district, approved, and adopted. If the principal was due, the interest was also due. The defendant cannot recognize the contract to be valid as to the principal, and invalid as to the interest. We think the court was correct in directing a verdict. *Jones* v. *School District*, 110 Mich. 363 (68 N. W. 222).

Judgment affirmed.

The other Justices concurred.

TOWNSEND *v.* KREIGH.

1. VENDOR AND PURCHASER — PURCHASE-MONEY MORTGAGE — ESTOPPEL.

   A grantee of land who has given back a purchase-money mortgage, and entered into possession under his deed, is estopped from disputing his grantor's title for the purpose of defeating the payment of the mortgage.

2. EJECTMENT — CODEFENDANTS — TITLE — COMMON SOURCE — JUDGMENT.

   3 Comp. Laws, § 10973, provides that if any of the defendants

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in an action of ejectment, at the commencement of the suit, occupied or claimed distinct parcels in severalty or jointly, and other defendants possessed or claimed other parcels in severalty or jointly, all of which titles were derived from the same source, the jury shall state particularly in their verdict, if in favor of plaintiff, the description of the parcel claimed by each defendant, but, if the titles are from different sources, plaintiff shall elect against which he will proceed. T. conveyed certain land to M., taking back a mortgage. M. deeded one-half of the land to W., and W. sold one-half of his interest to K., who entered into possession without receiving a deed. Plaintiff purchased the land at foreclosure sale, and brought ejectment against M. and K. In the meantime K. had purchased certain alleged outstanding titles to the entire premises, and quitclaimed to M. the parcel occupied by him. *Held*, that the titles of defendants were derived from the same source, and a recovery might be had against both.

3. SAME—VERDICT.

But in such case the verdict should particularly describe the parcel claimed by each.

4. SAME—APPEAL—CORRECTION.

Where the verdict was defective in this respect, but the proofs were clear, and there was no dispute as to the descriptions, plaintiff was permitted to avoid a reversal by consenting to a correction.

Error to Mason; McAlvay, J. Submitted January 15, 1903 (docket No. 49); opinion filed, for reversal, May 12, 1903. Rehearing granted June 23, 1903; reargued October 23, 1903 (docket No. 68); former decision reversed November 9, 1903. Second application for rehearing denied February 16, 1904.

Ejectment by Gertrude Townsend against Joseph Kreigh, Eliza Kreigh, Jacob Mahler, and Ellen Mahler. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Affirmed conditionally.

Fitch & Reek, for appellants.

M. B. Danaher and *Morse & Locke*, for appellee.

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CARPENTER, J. This is an ejectment suit to recover possession of the northeast quarter of the southwest quarter of section 27, township 18 north, of range 16 west. Plaintiff obtained her title February 15, 1899, by purchasing at a statutory foreclosure of a purchase-money mortgage executed November 25, 1882, given by defendant Jacob Mahler to Larmon B. Townsend, plaintiff's husband. On said 25th of November, 1882, said Larmon B. Townsend and Gertrude, his wife (plaintiff in this suit), conveyed the lands in suit by warranty deed to said defendant, Jacob Mahler. Jacob Mahler at once took possession of the land, and conveyed the east half of the same to William Kreigh, the son of defendant Joseph Kreigh, who soon thereafter conveyed to his father one-half of his interest. The son, William, after living on the property for about seven years, moved away, and subsequently died. Defendant Mahler, with his wife, continued in occupancy of the west half, and defendant Kreigh and his wife of the east half, until the commencement of this suit.

To defeat this suit defendants undertook to prove that said Larmon B. Townsend did not own the land in question at the time he deeded the same to defendant Mahler; that, soon after defendants took possession, some Indians came to them, and claimed to own the land; that in 1888 they tried to borrow money upon this land, to pay off the mortgage under which plaintiff now claims title, but could not borrow the money, because the title was defective; that on the 17th of January, 1899, defendant Joseph Kreigh purchased said outstanding title, and thereafter conveyed the west half of the property in controversy to defendant Jacob Mahler. It is to be noted that no claim is made, nor does the evidence prove, that the proceedings to foreclose the mortgage in question were not commenced within the time specified in 3 Comp. Laws, § 9725. The trial court made a ruling which, in effect, excluded defendants' testimony, and then directed a verdict in plaintiff's favor.

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The ruling excluding this testimony was clearly correct. Defendants, while in possession of this land under the deed from Larmon B. Townsend, were estopped from disputing his title for the purpose of escaping the payment of the agreed purchase price. *Robertson* v. *Pickrell*, 109 U. S., at page 615 (3 Sup. Ct. 407); *Peters* v. *Bowman*, 98 U. S. 56; *McConihe* v. *Fales*, 107 N. Y. 404 (14 N. E. 285). It follows that they are estopped from disputing their grantor's title for the purpose of defeating a purchase-money mortgage. This application of the principle of estoppel is most equitable. The title purchased by defendants was barred by the statute of limitations before their purchase was made. Defendants' possession, under the deed from plaintiff's husband, destroyed the title which they now assert. They acquired, therefore, no additional rights to possession by their purchase of said title. Their entire right to possession, then, comes from their deed from plaintiff's husband, unless, while holding under said deed, they have acquired a right adversely thereto. It would be useless to refute the proposition that a grantee, who has given back a purchase-money mortgage, holds adversely to his grantor and to said mortgage, merely because the title of his grantor is defective.

Inasmuch as the testimony in the case proved that the holding of defendants was not joint, but several, the court erred in directing a verdict, under the declaration, which charged a joint holding. See *Murphy* v. *Campau*, 33 Mich. 71. While this precise objection was not made in the court below, it can, nevertheless, under the authority of *Haldeman* v. *Berry*, 74 Mich., at page 436 (42 N. W. 57), be raised by assignment of error to the charge.

For the error pointed out, the judgment must be reversed.

The other Justices concurred.

ON REHEARING.

HOOKER, C. J. The only question before us upon this hearing is whether the judgment rendered in ejectment

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against two defendants holding different portions of the property in dispute, in severalty, can be sustained, under the statute (3 Comp. Laws, § 10973) which provides that:

"When the action is against several defendants, if it appear on the trial that any of them, at the commencement of the suit, occupied or claimed distinct parcels in severalty or jointly, and that other defendants possessed or claimed other parcels in severalty or jointly, all of which titles, possessions, or claims were derived from the same source, the jury in such case shall state particularly in their verdict the description of the parcel claimed by each of said defendants, when the said verdict shall be for the plaintiff; and in case the said several titles, claims, or possessions were derived from a different source, the plaintiff shall elect at the trial, and before the testimony shall be deemed closed, against which he will proceed, and a verdict shall be rendered for the defendants not proceeded against."

Larmon B. Townsend asserted ownership of the premises in fee, and on November 25, 1882, he and his wife, Gertrude Townsend, gave a warranty deed thereof to Jacob Mahler; taking a purchase-money mortgage from Mahler. On May 25, 1883, Mahler and wife deeded the east half of the premises to William Kreigh, subject to said mortgage. Gertrude Townsend, as the sole heir of Larmon B. Townsend, foreclosed the mortgage, and holds a sheriff's deed, dated February 15, 1899, to the entire premises, and brought ejectment against Joseph Kreigh and Jacob Mahler and their wives. We understand defendants' contention to be that the statute cited is not applicable to this cause, for the reason that the several defendants, Mahler and Kreigh, did not derive their titles from the same source.

Joseph Kreigh came into possession of his portion of the premises in 1883, under his son, William Kreigh, who was living upon the premises; Joseph having purchased half of the son's interest, though no deed passed. The son lived there about seven years thereafter, and then moved away, and has since died. Joseph and wife have lived

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there ever since, claiming the land as theirs. When an attempt was made to collect this mortgage, the defendants questioned the validity of the Townsend title, and asserted that the legal title was outstanding in some Indians, and Kreigh acquired deeds from some alleged Indian owners of interests in the property. A finding of the probate court was made February 20, 1899, adjudging that of the real estate of one Kaw-bay-o-maw, deceased, the following were the lawful heirs, viz.: Ka-kako-me, one-fourth; Shaw-wan-ne-be-quay, one-fourth; Mon-yan, one-eighth; Paw-com-co-mo-quay, one-eighth; George King, one-fourth. Kaw-bay-o-maw purchased the land from the United States government. Mon-yan, Ka-kako-me, and Shaw-wan-ne-be-quay deeded their interests to Godfroy in 1872. Paw-com-co-mo-quay deeded to Houseman in 1886. Other persons claiming to own one-fourth interest as heirs of Kaw-bay-o-maw deeded to Houseman in March, 1887. All of the titles of Godfroy and Houseman were acquired by Townsend, who deeded to Mahler by warranty deed. In January, 1899, Kreigh and Mahler set about getting some deeds of alleged Indian titles, and several deeds were taken in Joseph Kreigh's name, and subsequently Joseph Kreigh quitclaimed to Mahler all of his interest in the share held by him. Thus it appears that each defendant shared in all Indian and other titles held by the other, except that Joseph Kreigh had no paper title representing the Townsend interest. But, if Kreigh is to be believed, he had a right to a deed, and he was claiming under and asserting that title at all times, and never asserted another until January, 1899, when he acquired the Indian titles referred to. In short, all of the titles held by Kreigh are identical in their origin with all held by Mahler, and therefore their titles came from the same source.

The judgment of the circuit court is affirmed.

The other Justices concurred.

ON SUBSEQUENT APPLICATION FOR REHEARING.

PER CURIAM. In this cause it is brought to our atten-

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tion that the verdict was defective for the reason that the jury failed to state particularly in the verdict the description of the parcel claimed by each of said defendants. This is true, but the proofs are clear, and the parties do not disagree upon such descriptions. The order heretofore made will be modified as follows:

The judgment is affirmed upon condition that plaintiff consent to a correction of the verdict and judgment in this regard; otherwise the case will be reversed, and a new trial ordered.

CITY OF DETROIT v. BLADES.

133 249
155 402

MUNICIPAL CORPORATIONS—SALARIES—AUTHORITY OF BOARD OF ESTIMATES.

Under the charter of the city of Detroit, where the board of estimates has stricken an item for the salary of a certain clerk from the estimate for the expenses of a department, the controller cannot be compelled by the council to draw a warrant for the salary of such clerk, though provided to be paid from a fund derived otherwise than from taxation.

Certiorari to Wayne; Hosmer, J. Submitted May 13, 1903. (Calendar No. 19,973½.) Decided May 15, 1903.

Mandamus by the city of Detroit to compel Francis A. Blades, controller of said city, to draw a warrant on the treasurer. The writ was denied, and relator applies for the writ of *certiorari*. Denied.

Timothy E. Tarsney, for relator.

PER CURIAM. The city of Detroit applied to the circuit court for the county of Wayne for a writ of *mandamus* to compel the controller of the city to draw his warrant for the sum of $321.67 in favor of J. H. O'Donoghue

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for services as sidewalk assessment clerk in the office of the board of assessors; the controller having declined to draw such warrant, and alleging as reason therefor that the board of estimates of the city had struck out the item for sidewalk assessment clerk from the estimate of expenses for the office of the board of assessors of the city, and he knew of no money which could be legally expended for the services of such clerk. The circuit court denied the writ of *mandamus*, and application is made here for a writ of *certiorari* to review that decision.

The writ must be denied. The case is ruled by *Robinson* v. *City of Detroit*, 107 Mich. 168 (65 N. W. 10), and in the denial of motion to modify the decree in that case so as to permit of salaries being paid from other sources than taxation; and in the case of *City of Detroit* v. *Blades*, heard March 18, 1902, where this question was involved, and the denial of *mandamus* below was affirmed, the following memorandum appearing: "Affirmed. See *Robinson* v. *City of Detroit*, 107 Mich. 168 (65 N. W. 10), and motion subsequently made in same case."

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135 [11]504
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136 [8]109
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138 379
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152 [6]313
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158 [8]220

LAMSON *v.* CITY OF MARSHALL.

1. ASSIGNMENT OF CLAIM—SECURITY—ACTION BY ASSIGNOR.
   The assignment of a claim as security does not prevent an action thereon in the name of the assignor with the knowledge and acquiescence of the assignee, the judgment being conclusive on the assignee.

2. SAME—CLAIM AGAINST CITY—PRESENTATION.
   Under a city charter forbidding suit against the city on a claim until after presentation thereof to the council, the presentation of a claim by one who has assigned it as security will support an action by him with the knowledge and acquiescence of the assignee.

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3. MUNICIPAL CORPORATIONS — CONTRACTS — CONSTRUCTION OF SEWER—CERTIFICATE OF ENGINEER—RIGHT OF ACTION.

A contract for the construction of a sewer for a city provided for final payment on the work being completed in accordance with the contract, and to the satisfaction of the engineer, and on its being tested in such manner as should, in his opinion, be sufficient, and on a certificate being made by him showing the completion of the work. It also provided that no pipe should be laid in water; that water should not be allowed to run through the pipes during the construction, unless with the permission of the engineer; and that, in case of misunderstanding as to the meaning of the contract, the engineer's interpretation should be final. The sewer proved defective by reason of the pipes having been laid in water, in consequence of which the engineer refused a certificate. *Held*, that if such method of construction was directed, *and not merely permitted*, by the engineer, the contractor could maintain an action on the contract, though this method was favorable to him, and he knew that he could not thereby make a tight sewer, and though the contract further provided that, while the engineer might assent to special means of prosecuting work in difficult cases, this should not relieve the contractor of responsibility for the result, and that he should be liable for any defects in material or workmanship that might become apparent before final settlement. HOOKER, C. J., and MONTGOMERY, J., dissenting.

4. SAME.

Especially was this so where the city was advised of the facts during the progress of the work, and paid the monthly estimates without objection.

5. SAME—ESTOPPEL.

A city is not estopped to set up an insufficient performance of a sewer contract by the mere fact of its payment of periodical estimates without protest.

6. SAME—AUTHORITY OF ENGINEER.

General authority on the part of a city engineer to modify a sewer contract cannot be inferred from the fact that he is authorized to direct the manner of its performance.

7. SAME—CERTIFICATE OF ENGINEER—RIGHT OF ACTION—UNPAID CLAIMS.

Under a contract for the construction of a sewer for a city, providing for final payment on a certificate by the city engineer that the work has been completed and that all claims for labor and material have been satisfied, the ex-

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istence of such claims when suit was begun by the contractor will not prevent a recovery, where the engineer, though knowing of the claims, said nothing about them in his notice that he would decline to accept the work until the sewer should be repaired, and the city was protected against liability for them by a sufficient bond, and they were in fact paid before the trial.

8. SAME—DELAY—STIPULATED DAMAGES.

A provision in a contract for the construction of a sewer for a city, under the head, "Penalty for Noncompletion of Work," that, if the work is not completed by the stipulated time, the contractor shall pay the city $10 a day while in default, as liquidated damages for the delay, and also the cost to the city of engineering, inspection, and superintendence during the default, is, as to the $10 a day, not a penalty, but a proper stipulation as to damages.

9. SAME—EXTENSION OF TIME BY COUNCIL.

There is not an extension of time by a city council, within a contract for the construction of a sewer for the city, providing for damages if the work be not completed at the stipulated time, or within such further time as may be allowed by the council, where, on petition for an extension, they merely adopt a report reciting that, while no advantage is desired, they believe it best to allow the matter to stand until final settlement, when all matters can be as readily settled as now.

10. SAME—WAIVER OF DAMAGES.

A provision in a contract for the construction of a sewer for a city, for payment to the city of damages of $10 a day for failure to complete it at the stipulated time, is not waived by permitting the contractor to complete it under the supervision of the city's engineer, and by receiving and paying estimates for the work.

11. SAME—ESTIMATE OF ENGINEER—CONCLUSIVENESS.

Under a contract for the construction of a city sewer, providing a higher price for rock excavation than for earth, and stating what shall be classified as earth and what as rock, payment to be made after the estimate of the city's engineer, whose interpretation of the contract is to be final, has been approved by the city council, his estimate is binding, if honestly made; and one attacking it has the burden of proving dishonesty.

12. SAME.

The contractor under such contract has no right to be present

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at a conference between the engineer and his assistant to determine how to classify the material excavated.

18. SAME—FRAUD—EVIDENCE.

That a city engineer's estimate of the rock excavated by a contractor in constructing a sewer for the city was only 1,600 cubic yards, while there were 2,400 cubic yards, is not evidence of bad faith, destroying the binding effect of his estimate; but the fact that, when the contractor was entitled to his first estimate, the engineer declined to make one on the ground that "it might scare the city fathers," saying that he would "wait until we got scattered around on the outside trenches, and then they wouldn't know where we were, or what the estimate was for," in connection with the fact that rock was not anticipated, does justify an inference that the estimate was not the engineer's honest judgment.

Error to Calhoun; Smith, J. Submitted December 4, 1902. (Docket No. 48.) Decided May 29, 1903.

Assumpsit by Daniel A. Lamson and David Crowley, copartners as Lamson & Crowley, against the city of Marshall, to recover a balance due for the construction of a sewer. From a judgment for plaintiffs, defendant brings error. Reversed.

John E. Foley (*James M. Powers*, of counsel), for appellant.

H. E. Winsor (*Weadock & Purcell*, of counsel), for appellees.

CARPENTER, J. The plaintiffs recovered judgment in the court below for $4,241.75, an unpaid balance claimed to be due them for the construction of a sewer system for the defendant corporation. Defendant insists that the court below should have directed a verdict in its favor, because: *First*, before suit was commenced plaintiffs assigned their entire claim against defendant to the Commercial Savings Bank; *second*, plaintiffs never obtained a certificate showing the completion of the work and the satisfaction of all claims for labor and material, which, by

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the contract, was a condition precedent to the right to maintain this action. Defendant also claims that the court below erred in not instructing the jury that it was entitled to stipulated damages for delay in construction, and in permitting plaintiffs to recover for 800 yards of rock excavation in excess of the allowance of the engineer. There are numerous other assignments of error, which will be sufficiently considered in discussing the foregoing assignments.

1. *Assignment to the Bank.* It appears that an assignment was executed by plaintiffs of "all moneys due and coming due" "for construction work on sewer" to the Commercial Savings Bank of Marshall. This was given to secure an indebtedness of $2,500, still unpaid at the time of the trial. Claim is made by the defendant that this assignment prevented a recovery in the name of the plaintiffs. Defendant contends that, though the plaintiffs presented this claim to the defendant's council, the failure of the Commercial Savings Bank also to present it affords a defense to the suit, because section 5 of chapter 17 of the charter of the city of Marshall forbids suits "against said city, on any account or claim, until the same shall have been presented to said council." We do not think this contention sound. It appears that the suit, though prosecuted in plaintiffs' name, was carried on with the knowledge and without the objection of the bank. The judgment in this case will, therefore, be conclusive upon the bank. The presentation of the claim by the plaintiffs complied with the charter provision above quoted.

2. Can this suit be maintained without the engineer's certificate that the contract was completed and the material and labor paid for? On the completion of the work, in July, 1900, it was found that a section of the sewer, 1,080 feet in length, under Spruce street, which affected about one-third of the sewer system of the city, was defective. Because of this defect the engineer refused to give his certificate, and directed plaintiffs to relay this sewer. To relay it would have cost more than the balance claimed

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due on the contract. The contract contained this provision:

"On all work provided for in this contract being completed in accordance with said contract, and to the satisfaction of the engineer, and on its being tested in such manner as shall, in the opinion of the engineer, be sufficient, and a certificate made by the engineer setting forth the amount of said work, and that said work has been completed, and that all claims for labor and material have been satisfied, the party of the first part agrees to pay to said parties of the second part the amount shown to be due to said second parties by said certificate of said engineer."

Plaintiffs contend that the defective condition of the sewer is due to a method of construction adopted by defendant's engineer, and therefore that, under decisions of this court hereinafter referred to, said engineer has no right to reject said sewer, or to withhold his certificate, because of its defective condition. The evidence of the plaintiffs tended to prove that, late in the year 1899, they encountered a large body of running water while constructing the sewer in question; that this water came into the sewer in such quantities that it could be removed in no practicable way; that the engineer's assistant, in charge of the work, stopped the laying of the sewer until the engineer, who was at that time in Toledo, should determine what to do; that on his arrival the engineer directed said plaintiffs to put a roll of cement as well as a roll of oakum around the joints, and then to proceed to lay the pipes in the running water; that, acting under these orders, and under the immediate supervision of the engineer or his assistant, plaintiffs laid about 300 feet of said pipe; that in May, 1900, in this same sewer, they were troubled in a similar manner with water; that at that time, acting under the direction of the engineer, they obtained a steam pump, and lowered the water, though they did not entirely remove it, and by his orders again laid pipe in the sewer while water was running therein, in the same manner as that adopted in the preceding year; and that as fast as the pipe was laid they covered it up, as they were required by their

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contract to do. The evidence tends strongly to prove that the defect in this sewer is due to the fact that the manner in which it was constructed did not exclude the water in which it was laid from entering the joints between the pipes. Defendant's testimony affirmed, and plaintiffs' denied, that the engineer consented to the method chosen on the condition that plaintiffs should make a sewer with absolutely tight joints.

In *Wildey* v. *School District*, 25 Mich., at page 424, Mr. Justice COOLEY said:

"Whatever passed under his [the superintendent's] inspection as the work progressed, and was in good faith approved by him, expressly or by implication, was not open to objection on the part of the defendant afterwards, and, as to so much of the work, at least, the plaintiff had the same right to recover that he would have had if the proper certificate had been furnished him. For it could never be held to be the intention of the parties, by any such words are are contained in this contract, to give the superintendent power to re-examine his own conclusions after the builder had, as he supposed, completed the work, and then to refuse a certificate, and preclude the builder from recovering payment, except upon the condition of making changes and modifications in particulars which had his approval, or, being fully known to him then, were not objected to when the work was being done. An express agreement to give him this power would be so one-sided that it is not for a moment to be supposed the builder would enter into it. This contract contemplated the production of the certificate as the evidence of the contractor's right to his pay; but it might be waived, as it was in this case to the extent that payments were made; and the plaintiff was entitled to it as of right, as to any further work which he had done with the superintendent's approval, up to the 85 per cent. to be covered by the monthly estimates, and to the full amount, if the work was completed under his direction.

"If there were intentional departures from the contract, either as to materials or as to the mode of construction, with the approval or concurrence of the superintendent, a question might arise whether the contractor was entitled to greater or less compensation than if the contract had been strictly complied with; but this rec-

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ord does not raise that question. Variances that may have been treated by both parties as immaterial at the time should not afterwards be held to be departures from the contract, and what was then regarded as substantial compliance with its terms should be held a performance in law."

In the case of *Schliess* v. *City of Grand Rapids*, 131 Mich., at page 62 (90 N. W. 704), it was said:

"The law would not permit defendant to see this work go on, to ratify it day after day and week after week, to see plaintiff putting in stone not in exact accord with the contract, and then say, when the work is done, 'You have not complied with the contract.' Its time to accept or reject was when the work was being done. It could not lull the plaintiff into the belief that this work was satisfactory, and, when completed, reject it."

Defendant contends that the principles announced in the foregoing cases do not apply to this case, on account of the provisions of the contract under which the sewer was constructed, and on account of the circumstances attending the building of the defective sewer. The provisions of the contract touching this question are as follows:

Plaintiffs were to "excavate for building, and complete, good, firm, and substantial sewers, according to the map of route on file in the recorder's office, including sewer pipe, iron pipe, cement, suitable packing, house connections, manholes, lampholes, outlet masonry, * * * and all other material and appurtenances necessary to construct a proper and complete sewer, of the dimensions set forth in the schedule hereunto annexed, in the manner and under the conditions hereinafter specified."

"Sewer trenches must be kept clean and free from water by the use of a pump, pail, or sponge during the process of the work, as no pipe shall be laid in the water."

"All pipes must be kept thoroughly clean, and no water will be allowed to run through them during the construction of the sewer, unless with the permission of the engineer."

"Although the engineer may assent to special means of prosecuting work in difficult cases, this will not relieve the contractor of the responsibility of the result."

"The contractor shall have charge of and be responsible

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for the entire length of sewers for whose construction he has contracted, until their completion and acceptance. He shall also be held liable for any defects which may appear in the material he has furnished, or in his work, before the final payments specified herein."

"Any tests which may appear to the engineer proper for ascertaining the condition of the pipes may be made use of, and the contractor will stand all damage caused by such tests. If any pipes are broken, or if cement in joints shall protrude sufficiently to form an obstruction to any test balls or other medium adopted by the engineer, the same shall be removed and made good by the contractor at his expense."

"If at any time after the acceptance of the work, and before the final five per cent. shall have been paid, any portion of the sewers, their appurtenances, or the surface of the street should require repairs by reason of faulty material or workmanship on the part of the contractor, the party of the first part shall notify the contractor, either in person or by mail, that such repairs are necessary, and defining the amount and nature of the work to be done. Should the contractor fail to cause such repairs to be made within ten days after such notice, the party of the first part shall have the right to purchase materials and employ men to execute the said repairs, and the cost of the same shall be deducted from the moneys due the contractor, or, from the insufficiency of said retained sums, shall be a charge upon the bond attached to this agreement."

"The work is to be done in accordance with the requirements of the plans, specifications, and contract, and in case of misunderstanding of the meaning of such plans, specifications, and contract, or any part of them, the engineer's interpretation shall be taken as final."

Wildey v. *School District* clearly holds that the engineer had sufficient authority to direct plaintiffs, if, in his judgment, the exigency demanded (and we are bound to assume it did), to disregard the provision that "no pipe shall be laid in the water." The plaintiffs had agreed to complete their work in accordance with the contract, and to the satisfaction of the engineer, and the engineer was made the judge of the meaning of the contract. The conclusion is unavoidable that the contractor performs his obligation when he does his work in the manner directed

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by the engineer. It is not for him to determine what his obligations are, as, in any event, he is bound by the decision of the engineer.

It is insisted, however, that the provision, "Although the engineer may assent to special means of prosecuting work in difficult cases, this will not relieve the contractor of the responsibility of the result," imposes upon the plaintiffs in this case the responsibility for the result of the improper method of laying this sewer. In my judgment, this provision is not applicable to this case. If the plaintiffs are right in their claim (and whether they are right or not is a question for the jury), the engineer did more than assent to the means adopted in this case. He positively directed their adoption.

It is urged that it was a favor to the plaintiffs to be relieved from their obligation to remove the water before laying the sewer pipe, and that they actually knew that they could not, by the method adopted, make a tight sewer. Though this is true, the testimony nevertheless warrants the finding that the method by which this pipe was laid was selected by the engineer without any suggestion whatever from the plaintiffs, and that he directed its adoption with no understanding whatever that they were to be responsible in the event of its failure. The fact that the method of construction directed by the engineer was favorable to the plaintiffs, and known by them to be imperfect, might have great weight with the jury in determining the issue of fact raised by the conflicting testimony as to whether plaintiffs or defendant assumed the responsibility for the consequences resulting from the changed method of construction. But I know of no principle which permits the contractors to disobey orders of an engineer directing a variation from the contract because that variation is to their advantage, or because they believe that variation to be detrimental to the interests of the other party to the contract. The contractors are bound to obey the orders made in good faith by the engineer, whether those orders are advantageous or detrimental to their in-

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terests; nor are they exempt from obedience because they believe those orders to be unwise.

The provisions in the contract making the contractor "liable for defects in the material he has furnished or in his work," and making him responsible for repairs "by reason of faulty material or workmanship," do not, in our judgment, apply to defective work performed at the express direction of the engineer. The engineer was, by the contract, made the final arbiter, and what he expressly directed as the work progressed was, as far as the contract was concerned, free from defects, and not faulty in workmanship.

There is also in the contract the provision heretofore quoted, providing for the payments after the sewer is "tested in such manner as shall, in the opinion of the engineer, be sufficient." The object of this test, manifestly, is to determine, not whether the methods adopted by the engineer were proper, but whether the plaintiffs have performed their work in accordance with their obligations. It is, in our judgment, repugnant to both equitable and legal principles to compel plaintiffs to again excavate and relay this sewer because the engineer selected an improper method of laying it.

Defendant argues that the plaintiffs' contention that the power rests in the engineer to change the method of performing the contract imposes upon it obligations never entered into by its common council. The same argument might have been urged in *Wildey* v. *School District* and *Schliess* v. *City of Grand Rapids*, *supra*. In our view, a municipality cannot avail itself of the advantage of having a supervising architect, with power to decide on every detail as it may arise, without taking the consequences of his making an erroneous decision. To hold that a municipality could not avail itself of the services of such a superintendent would be to shear it of a very proper and necessary power.

In the engineer's report to the defendant, January 20, 1900, we find the following:

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"I would call your particular attention to article 8, paragraph 3, and to article 9, relative to flow of water. [These are the contract provisions heretofore quoted.] Had Mr. Lamson been compelled to keep the sewer dry by use of 'pump, pail, or sponge,' it would have ruined him. He has honestly endeavored, we believe, to build a perfect sewer; his methods, and his use of dry concrete, have enabled him to get good results; and, knowing that he was losing, your engineer did not enforce the pumping, although, in the opinion of the writer, it could have been done most of the time."

Information was thus conveyed to defendant's corporate organization of the method of laying sewer adopted by the plaintiffs, with the consent of the engineer. Defendant's failure to make any objection to this method, and its continuance to pay monthly estimates, would furnish evidence of its assent to the method adopted, if that assent is necessary.

It follows from the foregoing that, in our judgment, the jury were warranted in finding that the defective condition of the sewer was due solely to an improper method of construction lawfully ordered by the engineer in charge; and, if they did so find, plaintiffs were entitled to recover for this work, without the engineer's certificate, in accordance with the decisions of *Wildey* v. *School District* and *Schliess* v. *City of Grand Rapids*, *supra*.

The court, however, erred in instructing the jury:

"If you find they [the engineers] permitted the work specified in the contract to be performed in a manner different than that specified in the contract, they waived the conditions of the contract, and the plaintiffs are entitled to recover."

This language, as does the language in other parts of the charge, throws the responsibility upon defendant where the engineer has only assented to a departure from the contract. In such case the terms of the contract imposed on plaintiffs "the responsibility of the result."

Nor was it proper to charge the jury:

"The city could not permit the plaintiffs to perform this

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work, put down sewer pipe, cover it up, pass it as satisfactory to them at the time, if they did so pass it, make estimates upon it, and pay them, and thereafter reject the same as unsatisfactory."

See *Boots* v. *Steinberg*, 100 Mich. 134 (58 N. W. 657).

Nor do we approve of portions of the charge from which the jury might have understood that the engineer and his assistants possessed general authority to modify the contract. They had no such general authority. They did possess, however, the power to direct plaintiffs in the performance of their work. Under our views, as expressed herein, plaintiffs were excused for deviating from the contract when, and only when, they acted under that direction.

It also appeared that, at the time this suit was instituted, the plaintiffs had not paid an account for sewer pipe of about $1,600, and a few other small accounts, amounting to less than $500. After plaintiffs claimed to have completed their contract, and just before this suit was commenced, they received a written notice from the engineer, stating that he would decline to accept their work until they repaired the sewer. Nothing was said in this notice about the claims under consideration, though their existence and condition were known to the engineer. Defendant was protected against liability for these claims by an indemnity bond, the sufficiency of which is not questioned, and they were paid just before the trial commenced in the court below. Under these circumstances we do not think that the existence of these claims at the time suit was commenced affords a defense. Plaintiffs were justified in acting upon the notice from the engineer, which told them, in effect, that they could obtain his certificate by rebuilding the sewer, and only in that way. According to that notice, the payment of the claims would in no way have aided them in obtaining the certificate.

3. *Stipulated Damages.* Plaintiffs claim their work was completed June 24, 1900. The contract contained this provision under the head, "Penalty for Noncompletion of Work:"

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"It is hereby mutually understood and agreed that time, whenever mentioned in this contract, is the essence of this agreement; and the said parties of the second part still further agree that if said work is not completed on or before said date of completion [which is January 1, 1900], or within such further time as may be allowed by the city, through the common council, for such performance and completion, they shall and will pay the common council for the city of Marshall the sum of ten dollars for each and every day that the said parties of the second part shall be in default, as liquidated damages for said delay; and also that they shall and will, in addition thereto, pay to the said city the cost of engineering, inspection, and superintendence that the common council may have found it necessary to incur after the time fixed for the completion of the work aforesaid; all of which shall be determined by the engineer, and certified by him in writing."

The trial court instructed the jury to allow the cost of engineering, inspection, and superintendence occasioned by the failure to complete the contract January 1, 1900, and to disallow the amount of $10 per day stipulated damages. It is contended, in support of this ruling, that the $10 per day is not only named as a penalty, but is a penalty, inasmuch as the provision requiring the plaintiffs, in addition thereto, to pay the cost of engineering, inspection, and superintendence, covers all the actual damages caused the city. We cannot assent to this reasoning. The fact that the word "penalty" is used is not decisive. *Jaquith* v. *Hudson*, 5 Mich. 123. Neither is it true that the provision requiring the plaintiffs to pay the cost of engineering, inspection, and superintendence covers all actual damages. This does not include any compensation to the city for being deprived of the use of this sewer, which cost $28,000. Nor is it true that the interest on the cost of the sewer would compensate the city or its inhabitants for being deprived of its use. It was, under the authorities, a proper case for the stipulation of damages.

It is argued that "the common council extended the time in which to perform this work by leaving the matter open until the work was completed, as they stated, and by permitting the contractors to continue the work the fol-

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lowing spring, sending their engineer to examine it, receiving the estimates upon the work, and making payment on the estimates." Just before the 1st of January, 1900, plaintiffs petitioned the common council for an extension of time for completing their contract until June 15th of the following year. On the 8th of January, 1900, the council adopted the report of a committee, which contained this language:

"While no advantage is desired to be taken of the contractors, we believe it best to allow the matter to stand without action until the final settlement of the contract, when all matters relating to the contract can be as readily settled as now, and that such action is better than to settle part of the matter now, and leave the rest until the future. We therefore recommend that the petition be laid on the table until the completion of the sewer under the contract."

This clearly was nothing more than a statement to the contractors that this question would be determined when their contract was completed. It certainly was not an extension of time.

Was the right to insist upon these stipulated damages waived by the city's permitting plaintiffs to proceed, under the supervision of its engineers, and by receiving and paying estimates for the work? This course is precisely what was contemplated by the contract when it was made, and by the council of the city when they declined to act upon the petition to extend the time. In other words, the contract provided, and the understanding contemplated, that, if the work was not performed by January 1, 1900, it should be performed later. We are unable to see how carrying out the contract according to its terms affords evidence of the waiver of those terms. In our judgment, therefore, plaintiffs must pay the stipulated damages under consideration.

4. *Rock Excavation.* The engineer estimated that plaintiffs excavated 1,594.6 cubic yards of rock. Plaintiffs claim that they excavated 2,400.8 cubic yards. The difference between the estimate of the plaintiffs and the

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defendant is due largely to a difference in classification, plaintiffs insisting that certain material encountered in excavation should be classified as rock, which the engineer classified as earth. The contract price for rock excavation was $2 per cubic yard. It provided:

"All stones or boulders under eight cubic feet in volume will be classified as earth. * * * All boulders, ledge, or stratified rock having eight cubic feet in volume or over shall be paid for per cubic yard as rock. All shale which can be removed by pick or bar shall be classified as earth excavation. All shale requiring blasting for its removal shall be classified as rock. * * * The engineer shall, in all cases, decide whether blasting is necessary or not."

"In case of misunderstanding of the meaning of such plans, specifications, and contract, or any part of them, the engineer's interpretation shall be taken as final."

"All work to be paid for by the cubic yard * * * after the estimate of the engineer has been submitted to the common council in writing, and after the formal approval of such estimate by the common council."

Under the charge of the court the jury were permitted to disregard the estimate of the engineer, and to allow the plaintiffs' full claim for rock excavation, on the theory that the testimony warranted the inference that there was fraud or such gross mistake in the estimates as to make them of no binding force. Defendant insists that, under the evidence in this case, the jury should have been instructed that the estimates were final and conclusive. Plaintiffs' counsel claim that:

"The only accurate, honest measurement made of the rock was made by Mr. Lamson [plaintiff], with the assistance of his foreman; * * * that Mr. Riggs [the engineer] and Courtright [his assistant], in consultation in secret, * * * determined how they would classify the rock, and did not give the contractors any information as to what that classification was; and that they made computations of the rock excavated according to the profile that was made in Toledo by a draftsman who never saw the work, and was shown to be wrong."

It also appears that more rock was encountered than was anticipated by the engineer. It is affirmed by the

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plaintiffs and denied by the engineer that about September 15, 1899, when they were entitled to their first estimate for excavating rock, the engineer said:

"If we got an estimate at this time, it would scare the city fathers so, as there was no rock figured on; and wait until we got scattered around on the outside trenches, and then they wouldn't know where we were, or what the estimate was for; and he put me off."

An estimate was made about a month later, but plaintiffs claimed it was insufficient. The last estimate of rock was made in January, 1900.

Does this evidence justify a disregard of the stipulations in the contract making the decision of the engineer final? In the case of *Chicago, etc., R. Co.* v. *Price*, 138 U. S. 185 (11 Sup. Ct. 290), the Supreme Court of the United States, speaking through Mr. Justice Harlan, said of stipulations of the character under consideration:

"We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them with reference to the execution of the contract, and it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

In harmony with this decision are the following cases: *Hanley* v. *Walker*, 79 Mich. 614 (45 N. W. 57, 8 L. R. A. 207); *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618 (3 Sup. Ct. 344).

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The rule deduced from these authorities, and the true rule, in our judgment, is this: The estimate is binding if honestly made; it is not binding if it does not accord with the honest judgment of the engineer making it; and the burden to prove dishonesty is upon the party attacking the estimate. These provisions would be nugatory if bad faith were inferred from mistakes in measurement, in computation, or in classification. Nor can we agree with the trial court that, under the circumstances of this case, even a mistake of 800 yards afforded evidence of bad faith. This might have been due to an honest difference of classification.

We do not think plaintiffs had any right to be present at the conference between the engineer and his assistant when they determined how they would classify the material excavated by plaintiffs. Plaintiffs were accorded their full rights if their complaints of improper measurement and classification were heard and honestly investigated and decided. They had no more right to be present at the conference between the engineer and his assistant than has a litigant in court to be present when the judges or the jury confer on his case.

There is no merit in the complaint that the engineer computed the rock from a profile made by a draftsman in Toledo, who never saw the work. The *data* from which the computation was made were approved by the engineer. The computation was made by him. As well might it be said that he could not dictate his estimates to a stenographer, and sign them after they had been written on a typewriter. The real question raised by this complaint, after all, is simply this (and it has already been sufficiently discussed): Do mistakes in the computation of the engineer justify a disregard of his estimate?

But, in my judgment, the testimony of the plaintiffs that the engineer declined to make an estimate on the ground that "it might scare the city fathers," saying that he would "wait until we got scattered around on the outside trenches, and then they wouldn't know where we

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were, or what the estimate was for," together with the fact that the rock was not anticipated, does justify an inference that the estimate made was not the honest judgment of the engineer. This testimony, if believed, tended to prove that the engineer had a motive for giving plaintiffs an estimate for less rock than they excavated, and that he was dishonestly influenced by this motive to violate the duty he owed to the parties to this suit to make an honest estimate in September, 1899. Surely, the jury might infer that he continued to be influenced by this motive when he gave plaintiffs their estimates, if those estimates were, as plaintiffs' testimony indicates, altogether too small.

It is apparent from this opinion, however, that, in our judgment, the trial court erred in charging the jury:

"If, from the evidence, you find that the engineer in charge, or his assistants, did not make accurate measurements of the quantity of rock excavated by the plaintiffs, or did not make any measurement of it, or if there is so great a difference between the rock as measured by them and the amount you actually find from the evidence to have been excavated as not to be accounted for by an error of judgment, then the measurement of the rock so made by the engineer or his assistants is not binding upon the parties, and you are entitled to find the quantity of rock actually excavated from the evidence in the case."

Also in charging them that:

"If you find from the evidence that there is a difference between the amount of rock as given by the engineer or his assistants and the measurement as given by the plaintiffs of upwards of 800 cubic yards, this difference would be so great that it could not be accounted for except by mistake or fraud, and you would have a right to determine the quantity of rock actually excavated from all the evidence in the case."

For the reasons stated, the judgment must be reversed, and a new trial granted.

MOORE and GRANT, JJ., concurred with CARPENTER, J.

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HOOKER, C. J. I concur in the reversal of the judgment for the reasons given by my Brethren, and for further reasons. The contract between the parties plainly implies that the plaintiffs should construct a good and tight sewer, so far as materials and labor will make it by following the methods of construction prescribed by the contract. This is indicated by the provision for the testing of the pipes, and for repairs, and for liability for defects, found in general stipulations 8 and 10, and section 4 of the Duties and Powers of the Engineer, and the use for which the sewer was designed. They are as follows:

"8. The contractor shall have charge of and be responsible for the entire length of sewers for whose construction he has contracted, until their completion and acceptance. He shall also be held liable for any defects which may appear in the material he has furnished, or in his work, before the final payments specified herein."

"10. Any tests which may appear to the engineer proper for ascertaining the condition of the pipes may be made use of, and the contractor will stand all damage caused by such tests. If any pipes are broken, or if cement in joints shall protrude sufficiently to form an obstruction to any test balls or other medium adopted by the engineer, the same shall be removed and made good by the contractor at his expense."

"4. Although the engineer may assent to special means of prosecuting work in difficult cases, this will not relieve the contractor of the responsibility of the result."

"If at any time after the acceptance of the work, and before the final five per cent. shall have been paid, any portion of the sewers, their appurtenances, or the surface of the street should require repairs by reason of faulty material or workmanship on the part of the contractor, the party of the first part shall notify the contractor, either in person or by mail, that such repairs are necessary, and defining the amount and nature of the work to be done. Should the contractor fail to cause such repairs to be made within ten days after such notice, the party of the first part shall have the right to purchase materials and employ men to execute the said repairs, and the cost of the same shall be deducted from the moneys due the contractor, or, from the insufficiency of said retained sums,

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shall be a charge upon the bond attached to this agreement."

Section 3, art. 8, of the specifications provides:

"3. Sewer trenches must be kept clean and free from water by the use of a pump, pail, or sponge during the process of the work, as no pipe shall be laid in the water."

Section 1, art. 9, provides:

"1. All pipes must be kept thoroughly clean, and no water will be allowed to run through them during the construction of the sewer, unless with the permission of the engineer."

Section 3, art. 9, provides:

"3. When the trench is left at night, or pipe laying stopped from any cause, the ends of the pipe must be closed by using a circular end-board closely fitting the socket end of the last pipe, said end-board to have a large number of small holes bored near the center, to prevent the trench filling with water, and to keep out sand and earth from the sewer; but in no case shall said board be inserted and water allowed to enter the sewer until the engineer is satisfied that the cement of the joints in position is sufficiently set so as not to be injured by water coming in contact with it.

"This clause shall not prevent the engineer from ordering, but, upon the contrary, he may order, the end of the sewer closed absolutely tight whenever he determines that, in order to secure good results, the water should be excluded from the sewer. This shall apply to water entering the sewer or raising around the outside of the sewer. This right shall not be abridged or limited by any clause herein to the contrary."

In view of these various provisions, I am of the opinion that when the engineer consented to plaintiffs' laying the pipe in the water, in violation of section 3 of article 8, the city did not relieve the plaintiffs from the consequences of defective results by assuming the risk, even if it can be said that the engineer had authority to grant such privilege. The concession to lay the pipe in the water was made by the engineer (according to his testimony)

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because of the great expense to the contractors of removing the water, and he testified that it was upon the condition that they would make an absolutely tight joint. It is evident that it was a favor, and it is not inferable that he or the city intended or were understood by the plaintiffs to consent to accept a defective sewer. The contractors must be presumed to have known that they could not make a tight sewer in that way, and in fact testified substantially to that effect. Moreover, the contract expressly provides that, "although the engineer may assent to special means of prosecuting work in difficult cases, this will not relieve the contractor of the responsibility of the result." The evidence shows this to have been intended for a sanitary sewer, which plaintiffs knew must be tight to be of value, for they so testified.

Again, the provision that "no water will be allowed to run through them [*i. e.*, the pipes] during the construction of the sewer, unless with the permission of the engineer," which is relied on to support the claim that by so consenting the city waived the express provision that the pipe must not be laid in water, is susceptible of another construction, especially when read in connection with section 3 of the same article (9):

"3. When the trench is left at night, or pipe laying stopped from any cause, the ends of the pipe must be closed by using a circular end-board closely fitting the socket end of the last pipe, said end-board to have a large number of small holes bored near the center, to prevent the trench filling with water, and to keep out sand and earth from the sewer; but in no case shall said board be inserted and water allowed to enter the sewer until the engineer is satisfied that the cement of the joints in position is sufficiently set so as not to be injured by water coming in contact with it.

"This clause shall not prevent the engineer from ordering, but, upon the contrary, he may order, the end of the sewer closed absolutely tight whenever he determines that, in order to secure good results, the water should be excluded from the sewer. This shall apply to water entering the sewer or raising around the outside of the sewer.

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This right shall not be abridged or limited by any clause herein to the contrary."

The consequences appear to be very serious, setting the water back in the defective sewer and laterals for a long distance. In my opinion, there is nothing in this record that should estop the city from claiming its contract rights. See *Boots* v. *Steinberg*, 100 Mich. 134 (58 N. W. 657). It follows that, not only was there no waiver of the right to a tight sewer by the act of the engineer, but he was justified in not giving the certificate provided for by the contract.

The judgment should be reversed, and a new trial ordered.

MONTGOMERY, J., concurred with HOOKER, C. J.

McKEE *v.* CITY OF GRAND RAPIDS.

1. ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY—INTERLOCKING TITLES.

   Where, in ejectment for part of an island in an inland river, it appeared that, for more than 20 years before suit, defendant and its grantors had been in the actual occupancy of portions of the island, and had had the exclusive use of the remainder for such purposes as occasion required,—*i. e.*, for fishing, grazing, recreation, the taking of ice, the holding of public exhibitions, and the disposition of garbage,—claiming to own the entire island, defendant's title was established by adverse possession, though, as to the land in controversy, its paper title interlocked with the earlier title of plaintiff, under which he was in possession of adjacent territory.

2. SAME—ISLANDS—ACCRETIONS.

   As between one claiming an island in an inland river by adverse possession under color of title, and the owner of the adjacent mainland, accretions to the island made by dredging within a period of 15 years before suit belong to the owner of the island up to the original thread of the channel, and beyond that to the owner of the mainland.

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Error to superior court of Grand Rapids; Newnham, J. Submitted January 16, 1903. (Docket No. 58.) Decided May 29, 1903.

Ejectment by James H. McKee and James Langdon McKee against the city of Grand Rapids. From a judgment for plaintiffs for a part of the land only, they bring error. Affirmed.

Burlingame, Belden & Orton and *William E. Grove* (*Knappen, Kleinhans & Knappen*, of counsel), for appellants.

Moses Taggart (*Taggart & Taggart*, of counsel), for appellee.

MOORE, J. This action is ejectment, involving title to certain portions of an island situated in Grand river known as "Island No. 3." The plaintiffs claim title to the land in controversy through a patent issued by the United States to Henry L. Ellsworth, bearing date November 5, 1833, and *mesne* conveyances to them. It is claimed by the defendant that the Ellsworth patent, and consequently the plaintiffs' title, extends only to the thread of the easterly channel of Grand river, as it now exists. The defendant claims title to Island No. 3 through a patent issued by the United States to Richard Godfroy, bearing date August 10, 1840, and *mesne* conveyances to the said defendant. Island No. 3 is situated in the easterly half of the river, and it is the claim of the plaintiffs that it was conveyed to Ellsworth by the government patent executed to him in 1833, which did not refer to the island, and that the subsequent survey and grant to Godfroy of Island No. 3 were void. This claim was sustained by the court below. The defendant also claimed title by adverse possession. The jury found this claim to be true, except as to a line 10 feet west of and parallel with the thread of the easterly channel of Grand river. The plaintiffs have brought the case here by writ of error.

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It is the claim of the plaintiffs that the question of the legal title is settled in their favor by the case of *Butler* v. *Railroad Co.*, 85 Mich. 246 (48 N. W. 569, 24 Am. St. Rep. 84). The defendant does not concede this claim, but says the decision in that case proceeded upon the theory that not only was the east bank of Grand river surveyed in 1831, but the west bank also, while in fact, as disclosed by the record in this case, the west bank and the islands in the river were not surveyed until 1837, when the islands and west bank of the river were surveyed and meandered, and that this was after the Ellsworth patent was issued, and before the Godfroy patent, and that, if this situation had been understood, the decision in the *Butler Case* would have been different. As before stated, the trial judge decided the question of legal title in favor of plaintiffs. For reasons which will hereafter appear, we do not deem it necessary to refer further to this question. A reference to the plats in *Butler* v. *Railroad Co.*, *supra*, will aid in understanding the situation and make it unnecessary to reproduce them here.

The city claims to be the owner of Island No. 3. The upper portion of this island is used as a market place. South of the center of the island, and on the west side thereof, the city has a substantial and expensive lighting plant. One of the descriptions of land for which this suit is brought extends easterly and westerly across the island north of this plant. Some distance south of the lighting plant the city has erected, at an expense of upwards of $10,000, a crematory for burning garbage. One of the descriptions of land for which this suit is brought runs easterly and westerly across the island between the lighting plant and the crematory. About midway between the crematory and the south end of the island a railroad bridge, which spans both channels of the river, crosses the island. This bridge was built in 1881, and has a driveway beneath it, where teams can pass under it, and reach the lower part of the island. The only way to reach the island by teams is near the north end, from Oakes street. It is the claim of plaintiffs that, as owners of lots on the mainland

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which border on the east channel of Grand river, the lines of their lots extend across the island to the thread of the west channel of the river, while, as before stated, the city claims title by reason of the Godfroy patent and adverse possession.

The second question discussed by counsel for plaintiffs relates to that part of the charge of the trial judge reading as follows:

"A party's possession of a single parcel or tract of land is co-extensive with his claim of title; that is, if his deed is for an entire parcel of land, and he occupies a part, either personally or by tenant, his possession extends to the whole tract described in his deed or patent. If, therefore, you find that Alcott Caldwell was in possession of a part of the island under lease of the whole, the possession of the owners of the island, through him as their tenant, would extend to the whole island, it being a single parcel of land; and such possession would be adverse to the whole world if such possession continued for 15 years, or was continued through other tenants to make in the aggregate 15 years."

It is the claim of counsel that as the Ellsworth patent covered not only land on the east of the east channel, but the south half of the island, while the Godfroy patent purported to convey the entire island, the question of interlocker is involved, and applies to the south half of the island; and while Caldwell's occupancy, which will be referred to later, would establish title to the north half of the island, it would not do so as to that part of the island covered by both patents. Counsel say:

"The general rule is well settled that where a party enters, under color of title, into the actual occupancy of a part of the premises described in the instrument giving color, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims. This is true although the land is not actually inclosed, and though the tract may be divided into two parts by a river running through it."

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And as, under the Ellsworth patent, the grantee took possession of the land east of the channel, that this gave them constructive possession of the land on the island, and that this continued until they were ousted thereof by actual adverse possession. Counsel also say:

"Where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed or title, and, although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This, however, is subject to some qualification; for, if the true owner be at the same time in possession of a part of the land, claiming title to the whole, then his seisin extends, by construction of law, to all the land which is not in the actual possession and occupancy, by inclosure or otherwise, of the party so claiming under a defective deed or title. The reason is plain: Both parties cannot be seised at the same time of the same land under different titles, and the law, therefore, adjudges the seisin of all which is not in the actual occupancy of the adverse party to him who has the better title."

In order to decide whether the court erred in its charge to the jury, it will be necessary to go into the facts as disclosed by the record more in detail. Though the Ellsworth patent was issued in 1833, it does not appear that from that time until now any person claiming title thereunder was ever in actual occupancy of any portion of the island. It should be borne in mind that, until some time about 1870, the island was entirely surrounded by water. The east channel, at an ordinary stage, between the island and the land covered by the Ellsworth patent on the mainland, was 4 to 6 feet deep, and by various witnesses is stated to have been from 75 to upwards of 200 feet wide. As early as 1863 one Caldwell had a fishhouse on the upper end of the island, and claimed to have the right to control all of the island. He used seines in his fishing operations, both at the north end, the south end, and the west side of the island. He afterwards erected a building in which he built boats. He kept what the witnesses called a "boat livery," keeping a large number of boats

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for hire. He erected an icehouse, and took ice from the channel east of the north end of the island. He kept stock upon the island, which had the run of the island. He turned stock away which he claimed was trespassing on the island. He claimed the exclusive right to fish from the shores of the island. On the trial there was stated in the language of the record:

"Offered in evidence a tax history and records tending to show that Island No. 3 has been assessed subsequent to the patents from the United States government separate from the assessment of the mainland opposite thereto in Ellsworth addition, and that the taxes on Island No. 3 were paid by claimants under the chain of title from Richard Godfroy, while the taxes to the land opposite thereto, in Ellsworth addition, including the property of the plaintiffs, were assessed upon the same roll separately to parties claiming title in the line from Henry L. Ellsworth, under which the plaintiffs claim."

It was also shown that as early as June, 1855, James Miller and John T. Holmes obtained a quitclaim deed to the undivided half of Island No. 3, which deed was recorded the same month. Mr. Caldwell claimed that he was in possession of the island under Miller and Holmes. In November, 1872, James Miller obtained a warranty deed of the undivided one-half of the island from John F. Godfroy and wife, which deed was put upon record the next day. From this time on Mr. Miller claimed to be the owner of an undivided three-fourths of the island, and Mr. Holmes one-fourth. A written lease dated April 30, 1874, from James Miller to Mr. Caldwell, of the island, was put in evidence. Mr. Caldwell was to occupy it as a boat landing, for boats, boathouses, etc., and, in addition to a cash rent of $50, was to keep all trees on said island from damage, and see that no waste or depredations were committed. Indorsements were made on this lease up to May, 1878. Mr. Miller reserved to himself the right to use the island for shows, circuses, and public festivals. A witness having charge of Mr. Miller's papers after his death says there were other written leases, which were

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afterwards lost, of prior date to the one offered in evidence, and it was shown by the books of Miller that Caldwell paid rent to him as late as June, 1886. It was also shown that Caldwell remained upon the island, claiming to be the tenant of Miller and Holmes, until his death, in 1889. In August, 1881, the railroad company paid the Miller estate $375 for the right of way across the lower end of the island, and in the same month obtained deeds of the right of way from Mr. and Mrs. Holmes and from the heirs of Mr. Miller. At about the same time one of the plaintiffs sold to the same railroad company lots on the mainland to enable it to construct the bridge and its road-bed, and at once, after acquiring these deeds, the railroad company proceeded to construct its railroad across the island, bridging both channels of the river, and is now running its trains over said bridge and track.

As early as 1879 Miller and Holmes leased for money rent the right to cut ice along all the east shore of said island, except 10 rods south of Oakes street, for a period of five years. Ice was cut under this lease, and when it expired other leases of like character were made, and this continued as late as 1887, when one of the witnesses says the ice became unfit for use. For a portion of this time James H. McKee, one of the plaintiffs, made a lease, giving the right to cut ice east of the center of the east channel. As early as 1880 the Kent County Sportsmen's Club obtained from the Miller estate and Mr. Holmes, for a money rent, the right to put up a clubhouse, which was probably erected on the north half of the island. The club did target shooting once a week, to the south of the center of the island, shooting towards the railroad bridge, and the president of the club testified their shooting would extend over an area 30 rods square. This club used the island for this purpose for about 10 years. Before this there was a shooting butt near the railroad bridge, which was used by a militia company, which stood north of the butt when engaged in target practice. The Mohawk Club also had a lease of part of the island. As early as 1880

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the city of Grand Rapids obtained from Miller and Holmes the right to use portions of the island for the purpose of dumping garbage. The wagons reached the island from Oakes street, and traveled almost every weekday nearly the whole length of the island, dumping a large portion of the garbage south of the railroad bridge, and continued to do this until the crematory was built. In the winter fewer loads were drawn, but in the summer there were frequently 30 to 50 loads a day. For a considerable portion of the time the city hired a man continuously to spread the garbage and direct where it should be deposited. Miller and Holmes let circuses and shows occupy portions of the island for a money rent. Their tents would cover a large portion of the south end. The island was not adapted to agriculture. The south portion of it could not be reached without using boats or swimming the river, except by passing over the north half of it.

The record discloses that Miller and Holmes and their tenants, from 1872, occupied not only the north half of the island, but also that portion of the island which is covered by the interlocker (so called), for all purposes for which any one had occasion to use it,—and they were many,—and occupied it claiming to be the owners of it. For more than 40 years before this suit was brought, the grantors of the city were in possession of the upper half of the island, and for 20 years were in actual occupancy of portions of the interlocker, claiming to be the owners of the entire island. Nineteen years before suit was brought a right of way was sold by them to a railroad company, and a massive railway bridge was constructed. The public must have known the grantors of the city were claiming title to the whole of the island. The case was not left within any of the exceptions to the general rule as stated in the charge of the judge. It would be difficult to imagine a case where title by adverse possession was more clearly established, where the land was not actually covered with buildings. Instead of leaving the question of adverse possession to the jury, the trial judge, under

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the decisions of this court, would have been justified in directing a verdict in favor of defendant, except as to any lands added by reason of dredging the east channel. See *Clark* v. *Campau*, 92 Mich. 573 (52 N. W. 1026); *Henry* v. *Henry*, 122 Mich. 6 (80 N. W. 800), and the cases cited therein.

This brings us to the question of whether the court erred in his charge, and in his failure to give certain of the plaintiffs' requests, relating to the subject of accretions and relictions. The east channel was dredged in 1871 and at later times. It is claimed by plaintiffs that the water was diverted above the dredging, and that the earth lifted by the dredges was dumped along the center line of the east channel, and that as a result the east shore of the island was carried beyond the original thread of the east channel.

What we have said as to the effect of the possession of the island of those from whom the city gets title will make it unnecessary to discuss that portion of the charge relating to accretions and relictions which have existed more than 15 years. As to those which had not existed for 15 years the judge instructed the jury as follows:

"But if you find, gentlemen of the jury, that, as far as the island is concerned, the defendant has been in possession of the same adversely, but that the channel is narrower now than it was, and you should find that the narrowing of the same was not made by natural accretions to the land, and that the defendant had not been in adverse possession of the strip of land between what was then the west bank and the bank as it is now for a period of 15 years, then it will be for you to say how far from the east bank of the channel the plaintiffs are entitled to recover. * * *

"Should you find, under the rules that I have given you, that the plaintiffs are entitled to recover for any portion of the land which lies between what is known as the trees and the west bank of the channel, you will state in your verdict, 'We find for the plaintiffs, and fix the boundary line at ———', whatever number of feet you should happen to find it to be west of the west line of

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Market street, regardless of whether it takes in the land or whether it does not take in the land on the west side of the channel.

"If you should find, as I say, that the defendant has not been in adverse possession of that strip for 15 years, and that it was not made by the natural accretions that I have spoken about, then it would be for you to fix the line where the center of the channel was, and render your verdict accordingly."

It was the claim of plaintiffs that as a result of the dredging at various times, and of the diversion of the water at the head of the island, the east channel had been very materially narrowed, and the area of the island had been very materially increased. It was the claim of the defendant that the channel was not materially narrowed. Testimony was offered in favor of these conflicting claims. It is evident from the verdict of the jury that they accepted in part the theory of the plaintiffs in this respect. We think the judge did not err in his statement of the law which should control this feature of the case.

Judgment is affirmed.

The other Justices concurred.

STRATTON v. THOMAS.

Principal and Surety—Exhaustion of Remedy Against Principal—Collusion—Equity.

Where a judgment was obtained against a principal and his surety, and a levy made on the land of each, and subsequently, by collusion between them, the principal's land was sold to a third person, who was ignorant of the levy, the surety could not maintain a bill to restrain the sheriff from first selling his land in satisfaction of the judgment.

Appeal from Van Buren; Carr, J. Submitted January 8, 1903. (Docket No. 15.) Decided May 29, 1903.

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Bill by George Stratton against Wesley J. Thomas, sheriff of Van Buren county, Charles H. Wall, and Orson F. Stickney, to restrain the sale of certain land on execution. From a decree dismissing the bill, complainant appeals. Affirmed.

Hammond & Hammond, for complainant.

Thomas J. Cavanaugh, for defendants.

HOOKER, C. J. George and Theodore Stratton were brothers. A replevin suit was commenced by the latter against Wall in justice's court, and he was defeated, both in the justice's court, and, upon appeal, in the circuit. George Stratton was surety for his brother both in the original replevin bond and the appeal bond. Subsequently Wall recovered a judgment upon these bonds against both of the Strattons, and an execution was issued and levied upon an 80-acre parcel then belonging to George, and one of 50 acres then owned by Theodore. Subsequently, and pending the levy, Theodore sold the 50-acre parcel to Stickney, who was ignorant of the levy. Upon ascertaining about it, he arranged with the sheriff to first sell the 80-acre parcel owned by George. The bill in this cause was filed by George to restrain such action, and to compel the sale of the 50-acre parcel first, upon the claim that the surety should be protected by the sale of the property of the principal. The bill was dismissed, and complainant has appealed.

The defendants claim that the Strattons collusively caused the sale to be made to Stickney, and that the complainant has not come into court with clean hands. The evidence shows that, at the time the action upon the bonds was begun, Theodore Stratton owned the 80-acre parcel, and occupied it as a homestead. It was worth about $2,000, and was mortgaged for $1,000. George Stratton then owned the 50-acre parcel, which was incumbered to the amount of $250. Before the execution was levied, the brothers exchanged properties. Theodore conveyed his

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80-acre parcel to George, and received in return the 50-acre lot and a house and lot in Watervliet, into which he moved, and which he has since occupied as a homestead. He gave back a mortgage upon the 50 acres for $1,000. Stickney paid $1,000 for the 50-acre lot, and took it subject to the mortgage, which he paid, in ignorance of the levy. George Stratton testified that he had nothing to do with the sale to Stickney, and knew nothing of it until after it was consummated; and Stickney stated that he asked him, about three weeks before the trade was made, whether he and Theodore "had made a deal yet." Theodore testified that George had nothing to do with the deal. Our examination of the evidence leads us to the same opinion as that indicated by the learned circuit judge by his decree. He saw the witnesses, and we have no doubt that he reached a just conclusion in the case.

The decree is affirmed, with costs.

The other Justices concurred.

CRUMRINE v. AUSTIN.

1. CONTRACTS—PHYSICIANS—COMPENSATION—ACTION TO RECOVER.
   Defendant being ill, his physician telephoned a hospital, and was told that room, board, nursing, and the attendance of a house physician could be had for $15 a week. Nothing was said about an operation. Defendant went to the hospital, where he was operated on and afterwards cared for by plaintiff, who was called by the house physician. In an action to recover for such services, *held*, that there was nothing to support a finding that they were covered by the contract referred to, and hence defendant was liable for their reasonable value.

2. SAME—VALUE OF SERVICES—QUESTION FOR JURY.
   Plaintiff testified that his charge was reasonable, but admitted the custom of physicians to regulate their fees in such cases by the financial standing of their patients; while defendant

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testified that plaintiff told him, when he presented his bill, that persons who hold political jobs must pay for cases where doctors work for nothing. *Held*, that the reasonable value of the services was a question for the jury.

Error to Wayne; Rohnert, J. Submitted January 13, 1903. (Docket No. 31.) Decided May 29, 1903.

Assumpsit by Charles G. Crumrine against Charles H. Austin for professional services. From a judgment for plaintiff for less than the amount claimed, he brings error. Reversed.

Alex. J. Groesbeck, for appellant.

Washington I. Robinson, for appellee.

GRANT, J. The defendant being ill, his physician, a Dr. Schneider, advised his brother that he had better go to a hospital, and, at the suggestion of defendant or his brother, Dr. Schneider had a conversation with some one at the hospital by telephone, and was told by him that it would cost $15 a week for a private ward, and that would include room, board, nursing, and medical attendance, and he communicated this to Mr. Austin. On cross-examination Dr. Schneider qualified the above statement, made on his direct examination, by stating that he was told over the telephone that the price included the attendance of a house physician and nursing, and that nothing was said about an operation. Nothing in the testimony indicates that the nature of defendant's illness was mentioned in the conversation by telephone.

The defendant was removed to the hospital, where he remained several weeks. He was operated on by the plaintiff, who was called by the house physician, and he rendered him daily service by dressing his wound for a time. When the house physician did so on one occasion, defendant objected, and expressed a preference that the plaintiff should continue to dress his wound, and a willingness to pay extra if he would, and the plaintiff performed

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that service thereafter. Defendant paid the hospital the sum of $15 per week in advance, but was surprised to receive a bill from the plaintiff of $200 for the operation, and a total of $167 for other attention. The plaintiff testified that the price charged was reasonable, unless we are to consider it qualified by the statement that the charge in such cases depends upon the ability to pay, and his conversation with the defendant, from which it may be inferred that physicians "regulate their fees by the financial standing of their patients," and that "persons who have political jobs are made to pay for cases where doctors work for nothing," which Austin stated that plaintiff told him, and plaintiff denied. The court left the case to the jury under instructions of which the plaintiff complains, and a verdict was found of $99 for the plaintiff, and he has appealed.

The court instructed the jury that the case must turn on the question whether the hospital authorities agreed with the defendant, through Dr. Schneider, to include the cost of the operation in the price given of $15 per week; if they did, the plaintiff's recovery must be limited to the value of the services rendered after defendant requested him to attend to the duties which the house physician had taken up; if, on the contrary, surgical attention was not included in the bargain, the plaintiff should recover the reasonable value of his services, and the jury should in that case "be guided in the values as put upon the services by the plaintiff, as the reasonableness of such charges was in no way contradicted by any testimony that would alter that as a basis for computation of the damages." The verdict indicates that the jury must have found that the contract was made as claimed by the defendant. The plaintiff claims that the court erred in permitting the jury to so find, for the reason that there was no evidence of such a contract.

We have already seen that the only witness to this talk was Schneider, and that he admitted that the attendance promised was that of a "house surgeon and nursing."

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Schneider was defendant's agent, and neither the hospital nor the plaintiff is bound by any misapprehension on the part of Schneider, or misunderstanding growing out of his inaccurate report to the defendant of the terms offered. We must conclude from the undisputed testimony that the attendance of a house surgeon only was offered, and that neither party spoke of an operation. There is nothing to indicate that the hospital authority who talked to Schneider had any reason to suppose an operation was contemplated, and, if Schneider had one in contemplation, it was not mentioned. He asked for the house surgeon, and it is reasonable to suppose he knew the duties of such an officer; also that his patient would be expected to enter the hospital subject to its rules, whatever they were, except as they might be modified or affected by the conversation. The by-law introduced shows that the house surgeon is not given charge of patients. The circuit court could properly have said that the contract was not proved as claimed by defendant. The defendant would then be liable for the reasonable value of the services rendered. The plaintiff was injured by the instruction which permitted the jury to exclude the value of the operation and early attention from the sum allowed. On the other hand, we think that the reasonable value of the services was a question for the jury.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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KOPF *v.* MONROE STONE CO.

1. INJURIES TO SERVANT—USE OF EXPLOSIVES—ASSUMPTION OF RISK.

A servant employed in a stone quarry as a "driller," under the direction of the "loader," attempted to load a hole with

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dynamite, and was injured by an explosion. The loader was not the foreman of the work, or one whose directions the servant was bound to obey. *Held*, that the servant assumed the risk.

2. SAME—SUFFICIENCY OF WARNING.
Where an employé in a stone quarry is told by the one who is in charge of the loading and shooting of blasts how to put dynamite in the holes, and is warned to be careful, the instructions are sufficient, and it is not necessary that he should be told not to attempt to force the dynamite into a hole too small to admit its entrance.

3. SAME—CUSTOM—EVIDENCE.
Testimony that the drillers in a stone quarry were accustomed to load holes for blasts has little tendency to prove such custom, where the witness admits on cross-examination that this was done only occasionally.

4. SAME—KNOWLEDGE OF MASTER.
Evidence that the drillers in a stone quarry, contrary to the orders of the master, and, so far as appears, in the absence of all persons in authority, occasionally loaded holes for blasts, is insufficient to charge the master with knowledge of such practice.

MONTGOMERY and MOORE, JJ., dissenting.

Error to Monroe; Lockwood, J. Submitted January 15, 1903. (Docket No. 47.) Decided May 29, 1903.

Case by Christian Kopf against the Monroe Stone Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff was employed by the defendant as a driller, and had been so employed about eight weeks. His duty was to drill the holes, not to load and shoot them. Seven or eight drillers were employed. One loader, or "shooter," as he was called, was employed to load the holes with dynamite and shoot them. The theory of the plaintiff's declaration is that it was one of his duties to load the holes, and that he was not sufficiently warned against dangers in the use of dynamite. The theory is thus stated in his declaration:

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"Yet the said defendant, well knowing the premises, did not then and there, or any time prior thereto, instruct this plaintiff of the latent dangers of his work in relation thereto, and did not instruct and warn him that it was dangerous to push or press down upon or use force in pressing down upon such dynamite to cause the same to enter such hole or aperture, and did not instruct and warn him that such holes or apertures in the rock, if not large enough to freely admit the insertion of said dynamite against the side of such holes or apertures, was likely to cause the same to explode, and did not instruct and warn him that, by reason of such forcing or pressing down of said dynamite, the same was likely and liable to cause the explosion of the fulminating cap thereunder."

Plaintiff was employed by Lemerand, who was the foreman of the defendant, and who hired its men, including the plaintiff, and had charge of the work in the quarry.

The following facts are established:

(1) Plaintiff and the loader or shooter were fellow-servants.

(2) It was not a part of plaintiff's duty to load the holes. On the contrary, it was against the positive instructions of the defendant to its shooters and to its foreman, Lemerand.

(3) Lemerand never saw any drillers load holes, or was informed, or had any information or knowledge, that they were doing it, except in one instance, and then he severely reprimanded the man who did it, and told him to stop it.

(4) No officer of the company had any knowledge or information of any such practice, except that one of the directors, Mr. Wagner, who was secretary of the company, once had heard a rumor that the car men and some of the drillers had been using dynamite, contrary to the orders of the company. He spoke to Mr. Lemerand about it, stating that he did not want them to use it, and Mr. Lemerand said he would enforce the orders.

(5) There is no evidence showing that it is dangerous to place sticks of dynamite in a hole drilled sufficiently large to receive them.

(6) There is no evidence that any driller or loader had ever attempted before to force a stick of dynamite into a hole drilled too small.

(7) The practice, as it appears from the plaintiff's own

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witnesses, was, if a hole was drilled too small, to abandon it, and drill another.

(8) There is no evidence to show that dynamite is liable to explode by pressure from the thumb or finger in pressing it into a hole of proper size, or that any similar accident had ever before occurred. On the contrary, all the evidence upon this point is that such pressure is not liable to produce an explosion.

Defendant insists that in law no case was made for submission to the jury, and requested the court to so instruct them.

C. A. Golden (*Bowen, Douglas, Whiting & Murfin*, of counsel), for appellant.

Willis Baldwin and *Ira G. Humphrey*, for appellee.

GRANT, J. (*after stating the facts*). 1. Plaintiff knew that he was employed as a driller; that Lemerand was the foreman who employed him, and who alone had the right to direct him. He saw Lemerand daily. He knew that Freedon was the loader and shooter, and was under the control of Lemerand; and, after Freedon was injured by an explosion, that one Poland was the loader and shooter. Freedon was injured about a month before plaintiff's injury. Plaintiff testified: "Mr. Ed. Lemerand had charge of the drilling. He was boss." He knew that Freedon had no control over him. Freedon sometimes asked him to load the last hole, and he continued to do so under Poland. Plaintiff gave no word of testimony tending to show that he supposed that Freedon had any control over him, or the right to direct what he should do. He testified:

"Ed. Lemerand, the boss of the quarry, set me drilling holes. Charles Freedon had charge of shooting these holes. He was the man under the foreman that had charge of the shooting, — drilling, loading, and shooting blasts. Freedon had charge of the loading and shooting of the holes after they were drilled. As far as I know, Mr. Ed. Lemerand had charge of the drilling. He was

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boss. * * * *Freedon did not give me any orders while I was drilling there, about drilling and loading the holes. Freedon set me to work there. I was working under Lemerand, as far as I knew.* Freedon he told me to load the last holes. There were two,—one at 11:30, and another in the afternoon. * * * When Freedon asked me to load the holes, I said I did not want to load them; 'I am afraid of it.' He said the rest handled it; 'you might handle it.'"

Evidently the holes before had been large enough to receive the stick of dynamite, and there was no danger in loading such holes. He found this one too small. Upon this point his testimony is as follows:

"*Q.* You found the hole was too small?
"*A.* Yes, sir.
"*Q.* Why didn't you leave it alone?
"*A.* I never had any warning to do anything of the kind.
"*Q.* You knew the hole was too small?
"*A.* I didn't think it would do any harm to squeeze it. * * *
"*Q.* What did you do with this to get it down into the hole?
"*A.* I squeezed on this a little. It was sticking up a little, and I squeezed it. *I thought I had better let it alone.*"

Plaintiff's counsel, in their brief, say:

"It is probable knowledge, common to the ordinary man, that dynamite will explode when sufficiently jarred."

Plaintiff was familiar with the use of dynamite, and had seen it used every day for eight weeks. He had handled it before. He knew its liability to explode; that the only danger was from an explosion; that jarring is liable to cause one; and, if the hole was too small, he might have drilled another, and he thought he had better let it alone. Yet, without requirement from anybody to force this dangerous material into a hole too small, without any pretense that he had ever seen the work so done before, without any protest to his employer, or any direction from him, knowing that his employer had never seen

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him do this work, and that he was not employed for that purpose, he chose to handle this dangerous material, and to force it into a hole in the rock, at the request of one who he knew had no control over his action, and no right to direct him. One servant has no right to assume that a fellow-servant has any control over his movements, or any authority or right to direct him in his work. It is his duty to look to the master, or his *alter ego*, for directions; and when he is employed to do one kind of work, which is entirely safe, he has no right to assume to do another kind, especially when dangerous, without the direction of his master. Where the servant may perform his work in two ways, one safe, the other dangerous, the master is not responsible for injuries to him when he voluntarily assumes the dangerous way. Upon the same principle, when he is employed to do work unattended with danger, he cannot make the master liable because he either occasionally or habitually chooses to do dangerous work which he knows another is assigned to do. Under all the authorities, as I read them, he assumed the risk. The injury was the result of his own carelessness and voluntary assumption of work he was not required to do. It would seem to me unnecessary to cite authorities. The following, in my judgment, sustain the proposition: Bailey, Mast. Liab. 169; *St. Louis Bolt & Iron Co.* v. *Brennan*, 20 Ill. App. 555; *Brown* v. *Byroads*, 47 Ind. 435; *Knox* v. *Coal Co.*, 90 Tenn. 546 (18 S. W. 255); *Lindstrand* v. *Lumber Co.*, 65 Mich. 254 (32 N. W. 427). The language of Mr. Justice CAMPBELL in the last case is applicable here:

"Mill owners cannot be supposed to anticipate that laborers in other work about the mill will handle the saws, or assume that any such direction as was given in this case was meant to give any such discretion. Plaintiff does not testify that he supposed the foreman required him to run any such risk. Had such orders [for a laborer to use a circular saw] been given, they would not have justified him in doing what he did."

The law does not impose upon the master the duty to

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warn or instruct his servant in regard to work he is neither employed nor required to do.

2. Assuming that defendant knew that plaintiff was engaged in loading holes, what notice should have been given to him other than was given? Plaintiff testified that Mr. Freedon told him how to do the work. Freedon testified that he did give plaintiff dynamite to load some holes with, and explained the circumstances. "He was drilling three big stones in front of the car. The car men would have had to lie idle if I had not left dynamite." He testified that the car men insisted upon his leaving it for the hole, and he did so. He testified: "I told Kopf how to fix it; how it would be safe, also told him to be careful." We must assume, therefore, that he instructed him as to the method which Mr. Freedon safely pursued. If this was so, the instructions were sufficient. The most competent man, undoubtedly, to instruct the plaintiff, was Mr. Freedon. Was defendant or Freedon bound to anticipate that plaintiff would attempt to force this dangerous explosive into a hole too small, and to warn him not to do it? Common sense would teach any reasonable man better than to do that. It requires a jar to explode this material, and there is certainly danger of a jar in forcing a stick of dynamite into a hole too small. Whatever danger there was in that was as apparent to plaintiff as to any employé of the defendant. If the dynamite had exploded in consequence of plaintiff's attempt to drive it in with a stone, would it have been the duty of the defendant to anticipate this, and warn him that it was dangerous to strike it with a stone? The only witness to the transaction, aside from plaintiff himself, is another employé, who testified that plaintiff did strike it with a stone, and he was about to speak to him when the explosion occurred. Plaintiff saw Freedon and Poland load holes, and he does not pretend that he ever saw either do what he (plaintiff) did at the time of the accident. The law does not permit plaintiff to say, under these circumstances, that he was not properly instructed, or that defendant should have

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given him more specific instructions as to the dangerous character of dynamite. He knew the terrible consequences of an explosion. He knew that a jar was the cause of explosions. A warning to that effect would have been useless. See *Benfield* v. *Oil Co.*, 75 Hun, 209 (27 N. Y. Supp. 16). I do not think that this is a case for the application of the doctrine in *Smith* v. *Car Works*, 60 Mich. 501 (27 N. W. 662, 1 Am. St. Rep. 542), and *Ribich* v. *Smelting Co.*, 123 Mich. 401 (82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215). It is a case where the servant knew the danger, was familiar with the causes of explosions, and needed no warning.

3. It must be conceded that plantiff was acting outside the bounds of his employment, and that none of the *alter egos* of the defendant had any actual notice or knowledge that he was loading holes. The sole ground for charging liability is that this work had been done so long, and so openly and notoriously, that knowledge on the part of the defendant is to be presumed. This leads necessarily to the statement of the testimony upon this point. Unless there was sufficient evidence to in the law charge the defendant with knowledge, the judgment cannot be sustained.

It will be readily understood that the leaving of a stick of dynamite with the drillers for the last hole, and the putting of the same in the hole by the drillers, is not a transaction of so large proportions as to attract attention. It is apparent that this might be done day after day without Mr. Lemerand or any officer of the company knowing it. One of plaintiff's own witnesses, a driller, testified that he knew it was no part of his business to load, but did it. "I knew that there was a man there to do that work, and that it was no part of mine to do that." The quarry covers five or six acres, and any officer might stand around the edge of the quarry, or walk through it every day, without knowing that its orders in this respect were being violated. The holes were loaded twice a day,—about 11:30, and again when they quit work in the after-

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noon. Sometimes there was a third blast, in the morning. These are not times when the *alter egos* of the company were apt to be around the drilling places in the quarry. Immediately upon the holes being loaded, the whistle blew to get out of danger. Naturally those whose duty did not take them there would get out of the way at about blast time. Plaintiff testified:

"He [Lemerand] was not around any time when I was loading these holes; not that I know of. He was not around. * * * I did not see him anywhere when I loaded holes. He never saw me load holes at any time during the two months I was there."

He does not testify that he saw any other officer of the company there at those times.

One William W. Smith, a witness for plaintiff, testified that he had seen men drilling and seen men load holes, but he never saw a driller load holes. His business was loading cars in the quarry, where the drilling and loading were going on.

One Louis Burns also testified that he had seen drillers load holes; that he had been working there about seven months; that the drillers were loading holes right along, until plaintiff got hurt. On cross-examination he testified:

"When Freedon was hurt, I supposed Poland was hired to take his place. He left some [dynamite] for the drillers when it came close to shooting time. He left some for Jim Durocher; I suppose he did. I saw him do that once or twice. He left some for Jim Benore one day when I was drilling in the hole. Freedon did that. I saw him do it once or twice. Sometimes I worked in the hole for a half day, sometimes for only two or three hours. Freedon left dynamite to the drillers once or twice in the fall of the year 1900. I cannot swear that the dynamiter left dynamite for any more of the drillers to load the holes with."

One Deerbeck, another driller, said that he had worked there as a driller.

"I only loaded a few holes, two or three, up to the time Kopf was hurt,—battery shots."

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He saw other drillers load holes right along until somebody got hurt. On cross-examination he testified that he worked there about three summers, that Freedon was dynamiter when he left, and that all the loading he did was to help Freedon when Freedon asked him to. He said:

"I did not try to do it [load] when I was alone. I loaded one myself. I did it for fun. I was doing car work then, and had nothing to do with drilling holes."

On redirect examination this same witness testified that he saw other drillers load holes besides those he had mentioned.

"I drilled some of the holes myself, and loaded them myself. Freedon left the dynamite for me. I didn't pay any attention as to whether he left dynamite for others. When he left the dynamite for me he went around. I was not quite done with my hole. I could not tell who loaded the last holes if they were not completed when the shooter came around with the dynamite. If the hole was not completed, the shooter would not load them then. It was loaded the next time it was shot. There were several drillers, and each one drilled so many holes. Freedon came around with the dynamite. The last one before they got ready to shoot, if it was not completed, they would wait until the next time. * * *

"*Q.* Did the drillers ever load the last holes?

"*A.* Yes, sir; they would load them themselves sometimes; sometimes they would not. It was according to how the hole was. If it was deep enough, they would load it; if not, they would not."

One Edward Zeller, a car man, testified:

"It happened occasionally that the drillers loaded holes. They left the dynamite for the drillers to load holes just before quarter time, noon, and afternoon. I do not know how long that continued before Kopf got hurt. I worked there from the 5th or 6th of July until the week before they shut down. That was after Kopf got hurt. During all of that time the drillers did not do any loading that I know of. I paid no attention to what went on back of us.

"*Q.* You saw them load holes?

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"*A.* Sometimes I went with the driller. I requested dynamite to be left. I cannot tell when that was. It was early in the summer. To my knowledge I do not know of other cases of their leaving dynamite. I didn't pay any attention to the other cars. * * * When they distributed it they loaded every hole that was drilled. If there was a hole that was not finished, we requested him to leave, providing we were sure we could get the hole deep enough, and he would leave the dynamite.

"*Q.* The man that was drilling would load the holes?

"*A.* It only happened several times while I was there. I always loaded them myself. I have seen others load them."

On cross-examination he testified:

"I loaded them myself. Only a few times I loaded the holes. I was not a driller. I was working by the car. Two men would go as partners, and were paid by the car. That is what I was doing. In order to get stone, I would load the hole myself. That was an everyday occurrence in the forepart of the summer of that year. I told the dynamiter that I wanted him to leave the dynamite to shoot the holes the drillers were working at."

This witness worked there about six months previous to the accident.

One Joe Bellcover also testified that he had loaded holes; that nothing was said to him in reference to it.

"I understood that it was none of my business as a driller to load these holes, but I did it. I knew there was a man there to do that work, and that it was no part of mine to do it. I understood it was no part of my work; I understood that all right enough. I think I saw Kopf load two holes. I saw Louis Couture, a driller, load holes. Pretty nearly every time he was not through with a hole when the dynamite was left."

This is all the testimony on the part of the plaintiff to show a practice so open and notorious as to charge the defendant with knowledge of it, and consequent ratification. The testimony of a witness is no stronger than it is made by his cross-examination. Where a witness testifies that the drillers were accustomed to load holes, and he

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testifies upon cross-examination that it was done only occasionally, such testimony is of but little probative force to prove a custom. But, giving the testimony of these witnesses its greatest force, we find that only when a driller had his last hole so nearly completed that it was suitable for loading did the loader leave with him a stick of dynamite for the purpose of loading, and that the unfinished holes were left to be finished after the blast. All the others were loaded by the regular loader, the man specially employed and qualified for that purpose. Furthermore, it nowhere appears from the testimony of any of these witnesses that on any occasion was Lemerand, the foreman, or any other officer of the company, within sight, or that any such officer saw it, or was in position to see it. Plaintiff's own witness Smith (one upon whom he specially relied), whose business was right in the quarry where these holes were drilled and loaded, testified that he did not know of any such custom, and never saw a single driller load any of the holes. Yet the learned counsel insist that Lemerand and the other officers of the defendant should have seen, and did see, what Mr. Smith did not see. The evidence of those who managed the affairs of the company, and whose duties more or less frequently took them to the quarry, is that they did not see it; that they had no knowledge of it; and once acted promptly upon a rumor that it was occasionally being done. Mr. Lemerand testified that, during the seven years of his superintendency, he saw only one man, named Couture, doing it, and told him to stop it. He also testified that he told plaintiff not to handle dynamite. This statement is not denied. He also testified that after the loader, Freedon, was injured, notices were posted in the quarry prohibiting the handling of dynamite by any but the loaders. The only statement in contradiction of this is the testimony of plaintiff that he did not see them.

Mr. Freedon testified that on the occasions when he asked plaintiff to load the hole, and showed him how, "Lemerand was not around there. If he had been, I

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would not have done it, because he would have given me the devil for it." Frank Poland testified:

"The men who were employed to do the drilling had nothing to do with the dynamite, except, as far as I could see, if the hole was not loaded, they wanted to load to accommodate the car men; they wanted us to leave it to put it in. That did not happen often; very seldom. I never did that when the foreman was around, as it was against orders for anybody to handle dynamite except me. I never told Kopf to load holes. I never saw him load a hole. I never knew of him loading a hole."

Just before the blast it was the duty of the loader to go to the magazine, procure the dynamite, and proceed at once to load the holes. There was no variation from this custom. It evidently took but a short time. The stick of dynamite was from 4 to 6 inches long, and the last stick was placed in the hole just before the blast. The time of the blasts was well known. There is not a scintilla of evidence in the case to show that any *alter ego* of the defendant was present or in the immediate vicinity when this act of loading by any of the drillers or car men was done. Not one testified that he considered it a part of his duty. Only one testified that he was ignorant of orders against it.

This is not, in my judgment, a case for the application of the rule that knowledge and ratification of a practice may be implied from its open and notorious character. All these drillers who loaded holes, including the plaintiff, knew that it was not a part of their duty to do it. They knew that the loader had no control over them. One says he did it for fun. All did it voluntarily, evidently for the convenience and accommodation of themselves and the loader. They did it without asking the defendant's permission to do so, and one of them now seeks to fasten a burdensome liability upon the defendant by saying: "You ought to have known I was doing it, and either prohibited me from doing it, or warned me of the dangerous character of dynamite." If the defendant is, upon

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this record liable to the drillers, it is also liable to the car men, who sometimes loaded the holes. This is not a case of defective machinery, where the defect is exposed to view, and can readily be detected; nor the case of an employé of a railroad company, who openly and notoriously violates the rules of his company in the presence of its *alter egos*. Neither is it a case where any duty of inspection is involved. It was, in my opinion, incumbent upon the plaintiff to show that some of the officers of the defendant, who were its *alter egos*, were present and in position to see and know that he and other drillers were in the habit of loading the last hole. It is not, I think, a reasonable inference that any such officer of the defendant saw or heard of the practice which they had been so careful to guard against. Neither ought it, in my judgment, to be held that they should have known it, and that, in consequence, there was constructive notice of the custom.

The judgment is reversed, and new trial ordered.

HOOKER, C. J., and CARPENTER, J., concurred with GRANT, J.

MONTGOMERY, J. (*dissenting*). Plaintiff, who was an employé of the defendant, was injured by a premature explosion of dynamite, caused by his attempting to stick a piece of dynamite in a hole in the rock too small for the stick. The facts of the case, briefly stated, are that the defendant was engaged in quarrying stone, using dynamite for blasting. The work was under the immediate charge of one Lemerand, a foreman. The plaintiff was engaged in drilling the holes to receive the sticks of dynamite. When plaintiff first commenced his work, the dynamite was in charge of one Freedon, called a "shooter," whose duty it was to place the dynamite in holes previously prepared for the purpose at stated times during the day. The testimony on the part of the plaintiff tended to show that when he commenced work, some two months prior to the injury, he was instructed by Freedon to place a stick of dynamite in the holes last prepared by him before the

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shooting. The practice, as he testified to it, was this: Freedon would at a time near noon, or just preceding a blast, bring around dynamite, and place the sticks in such holes as were then completed, and at the same time leave with the drillers sticks of dynamite to be placed in additional holes when completed. After a time, Freedon was injured, and one Poland took his place. No additional instructions were given to the plaintiff by Poland, but plaintiff testifies that the dynamite was still left with him, and the practice continued. There was other testimony tending to show that the practice among the shooters was to leave dynamite with the drillers in the manner stated, and that this practice extended over a period, according to the testimony of one witness, of seven months prior to the injury. The plaintiff's testimony tended to show that he knew that dynamite was dangerous, but that he did not know of the peculiar danger of pressing the dynamite into a hole; that he never was warned of this danger; that, on the occasion in question, he pressed the dynamite with his thumb into the hole, and that it exploded, causing the injury. The defendant's testimony tended to show that an explosion could not be caused by such a use of the dynamite as plaintiff testified to. But we think this, under the testimony in the case, was fairly a question for the jury.

It is contended by the defendant, first, that from the knowledge it had, which did not include any positive information or knowledge that dynamite would explode under the circumstances stated, it was not the duty of the defendant to warn the plaintiff of such danger. The contention seems to be that it was the duty of the defendant to warn the plaintiff of such dangers as it had, from its experience or otherwise, acquired a knowledge of. But we think this states the rule too narrowly. We think at least the rule should be that, where a substance of this character is being used, the defendant is bound to warn its employés of such dangers as it knows of, or might by proper investigation have informed itself of; that want of knowledge on the part of the employer is not conclusively

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an excuse for the failure to give warning. We think, under the rule previously laid down by this court in *Smith* v. *Car Works*, 60 Mich. 501 (27 N. W. 662, 1 Am. St. Rep. 542), and *Ribich* v. *Smelting Co.*, 123 Mich. 401 (82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215), that it was the duty of the defendant to give warning of any peculiar danger which the defendant knew of, or which, having regard to the character of the substance employed, reasonable care and prudence should have acquainted it with.

It is contended, also, that the plaintiff was guilty of contributory negligence; but whether he was or not depends upon whether he was bound to have a knowledge of the danger of which he had not been warned, and of which the defendant, by the testimony offered, appears not to have been itself informed. We think that the evidence upon this branch presented a question for the jury.

But it is contended, further, that the shooter who ordered plaintiff to load the hole was not acting within the scope of his authority, and that the work which the plaintiff assumed to do was voluntarily assumed. Upon this branch of the case the learned circuit judge charged the jury as follows:

"If the jury find from the evidence in this case that the person in charge of the blasting, known as the 'shooter,' did direct the plaintiff to charge these holes, and that the plaintiff and the other drillers, acting in good faith and openly, believing such work to be in the line of their duty, did charge these holes for a period sufficiently long so that the defendant, by the exercise of ordinary care and prudence, should have discovered that the drillers and the plaintiff were charging the holes themselves, then the work of charging the holes with dynamite by the plaintiff will be deemed to have been done with the approval and under the direction of the defendant, and the defendant was then in duty bound to have warned the plaintiff of any latent and hidden dangers of his work."

We think this charge fairly presented this question to the jury. *Chicago, etc., R. Co.* v. *Bayfield*, 37

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Mich. 212; *Jones* v. *Railway Co.*, 49 Mich. 573 (14 N. W. 551); *Walker* v. *Railway Co.*, 104 Mich. 606 (62 N. W. 1032). It is true the testimony on the part of the defendant tends to negative any knowledge on the part of the foreman that the drillers were making use of dynamite, but as against this there is the evidence that the foreman's duties required his presence at this work every day; that he was all about the premises; and there is testimony strongly tending to show that the practice of the drillers of placing dynamite as above stated was continued for a period of seven months. If this be true, it certainly raised a question of fact for the jury as to whether the company did not, through its foreman, have actual knowledge that this practice was indulged.

The only questions discussed in the original brief of appellant are those which relate to the defendant's claim that a verdict should have been directed in its behalf. There is no complaint made that, if there is a case for the jury, it was not properly submitted. The inference is that defendant is satisfied that the verdict should stand, unless the court shall determine, as a matter of law, that a verdict should have been directed. We think there was a case which entitled the plaintiff to go to the jury, and the judgment should be affirmed, with costs.

MOORE, J., concurred with MONTGOMERY, J.

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DETROIT & TOLEDO SHORE LINE RAILROAD CO. *v.* HALL.[1]

1. RAILROADS—EMINENT DOMAIN—NECESSITY—APPEAL.
Where, in proceedings by a railroad company to condemn a right of way, both the court and jury, on conflicting testimony, have found the proposed road to be a public necessity, their decision will not be reviewed on appeal.

[1] Rehearing denied September 22, 1903.

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2. SAME—BONA FIDE EFFORT TO ACQUIRE LAND—EVIDENCE—JURISDICTION.

Where, in condemnation proceedings by a railroad company, the court, upon the issue whether a *bona fide* effort had been made to acquire the land, decided, on the evidence offered, that it was a case for a jury, but that the landowner might later offer additional evidence as to value for the purpose of perfecting the record, the refusal of another judge, before whom the matter was taken up, to hear the additional testimony, did not oust the court of jurisdiction to impanel a jury.

3. SAME—FINDING OF JURY—CONCLUSIVENESS.

Where, in condemnation proceedings by a railroad company, the jury viewed the premises, and the testimony as to value was conflicting, their finding thereon will not be reviewed on appeal.

4. SAME—INSTRUCTIONS—NECESSITY.

In proceedings by a railroad company to condemn a right of way, an instruction that railroads are public necessities, and that the taking of land for railroads is taking land for a public use, was not objectionable as removing the question of necessity from the jury, where other instructions specifically stated that it was for the jury to determine whether the proposed road was a public necessity, and whether it was necessary to take the land in question therefor.

5. EMINENT DOMAIN—DAMAGES—INSTRUCTIONS.

An instruction in proceedings to condemn land that the jury should pay the landowner what the land was worth, and no more, was not erroneous as excluding damages for anything on or under the land, as well as the damages resulting to the other land, where other instructions specifically stated that the value of the land was what it was worth, taking into consideration any injury that might be sustained to the land remaining.

6. RAILROADS—EMINENT DOMAIN—ALLOWANCE OF ATTORNEY'S FEES—APPEAL.

2 Comp. Laws, § 6248, providing for an appeal from "the appraisal or report of the commissioners or jury" in condemnation proceedings by a railroad company, does not authorize an appeal from the allowance of attorney's fees to the owner of land condemned, made under the express authority of section 6240.

Certiorari to and appeal from Wayne; Brooke, Hos-

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mer, and Frazer, JJ. Submitted January 13, 1903. (Docket Nos. 24, 25.) Decided May 29, 1903.

Condemnation proceedings by the Detroit & Toledo Shore Line Railroad Company against Edmund Hall and Mary Hall. Respondents appeal from the award of the jury, and bring *certiorari* to review the anterior proceedings. Affirmed.

Oscar M. Springer, for appellants.

Brennan, Donnelly & Van De Mark, for appellee.

MOORE, J. These proceedings were brought to acquire a strip of land belonging to the respondent Hall for railroad purposes, containing 3.64 acres. The jury awarded for the taking of said land $364. Their award was confirmed by the circuit judge. The proceedings are sought to be reviewed here. There are 100 reasons assigned why the judge erred in confirming the award, and the printed record contains over 600 pages. The proceedings were commenced before Judge Brooke, and conducted before him until directions were given for striking a jury. The jury was struck under the direction of Judge Hosmer, while the trial, after a jury was obtained, was conducted before Judge Frazer. It is likely some of the questions discussed by counsel would not have arisen if all the proceedings had been conducted under the supervision of but one judge.

It is claimed the proceedings must fail because there was no public necessity for another line of railroad between the points named in the petition, Toledo and Detroit. It is argued by counsel that, as the two railroads already constructed between those two cities can do all the business, another road is not necessary. On the other hand, it is claimed that the two roads between the two cities are practically under one management, so that there is no competition between them, and that there are nine railroads terminating in Toledo and six in Detroit, with no connec-

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tion between these terminals except the two roads mentioned, and that another connection was a public necessity. Proofs were taken in support of these diverse views. The judge, before he ordered a jury to be impaneled, must have been satisfied upon this point; and later the jury, as indicated by its award, was also satisfied. This court will not, under such circumstances, review their action. *Toledo, etc., R. Co.* v. *Dunlap*, 47 Mich. 456 (11 N. W. 271); *Port Huron, etc., R. Co.* v. *Voorheis*, 50 Mich. 506 (15 N. W. 882); *Saginaw, etc., R. Co.* v. *Bordner*, 108 Mich. 236 (66 N. W. 62); *Marquette, etc., R. Co.* v. *Longyear*, *ante*, 94 (94 N. W. 670).

The second objection, and perhaps the most important one, is stated by counsel as follows:

"It was error to strike or to draw a jury to condemn appellants' lands without giving appellants an opportunity to complete their proofs on the question of value of the property sought to be taken; for without such evidence the court could not determine whether or not a fair offer had been made to them by the appellee for the land before it filed its petition in this cause."

Counsel says it must be made to appear that a *bona fide* effort to acquire the land has been made before the aid of the court can be invoked, and that, before that can be determined, the court must receive testimony as to the value of the land, and all the testimony that the owner of the land desires to offer; citing a number of cases, but especially relying upon *Grand Rapids, etc., R. Co.* v. *Weiden*, 69 Mich. 579 (37 N. W. 872). The petition in this case follows the form approved in the *Weiden Case*. There was testimony taken before Judge Brooke showing that Mr. Hall was offered $100 an acre for his land by a representative of the company, and refused to take it. Testimony was also offered on the part of the railroad company that the land was worth $70 an acre. It was the claim of Mr. Hall that the land was part of a valuable stone quarry, and was worth at least $1,000 an acre. On the part of the railroad company it was claimed the land

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had no value as a quarry, and proofs were offered in support of these various claims. After the attorney for Mr. Hall had called all the witnesses he had in court, there was a discussion as to a further hearing at which he might put in additional proof in relation to value. Any delay was objected to on the part of the railroad company. The court informed the attorneys, in substance, that there was such a wide difference in the estimates of values, and enough testimony had been put in upon that subject, that more witnesses swearing the land was worth $1,000 an acre would not change his opinion, and that he thought it his duty to order a jury; but that, if the attorney desired to put the record in better shape, he might, on the morning the jury was to assemble, call witnesses as to value; and made an order that a jury be called for the following Tuesday. Judge Brooke had occasion to leave the city before Tuesday, and the proceeding was taken up before Judge Hosmer. The attorney for Mr. Hall objected to the striking of a jury, and stated he desired to swear witnesses to show there were 12 apple trees upon the land, worth $150 to $200 apiece; that there was other timber, worth more than the entire amount offered by the railroad company; and that the stone under the land was worth upwards of $100,000. Judge Hosmer declined to hear this testimony, because he was of the opinion that Judge Brooke, in order to reach the conclusion that it was his duty to order a jury, must have been satisfied there was a *bona fide* effort made to acquire the title to the land, which effort had failed.

It is undoubtedly true that, if Judge Brooke had been present, he would have received this testimony; but it is evident, from what was stated by him, it would have been received only for the purpose of perfecting the record, so that his action might be reviewed in this court. It is very apparent he was satisfied there was such a wide difference of opinion as to the value of this property that the parties could not arrive at an agreement for right of way, and that it was a proper case to be submitted to a jury. The offer made on the part of the attorney for Mr. Hall accomplished

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the same purpose sought to be accomplished by Judge Brooke. There must come a time, in the preliminary proceeding before the judge, to decide whether a jury shall be called or not, when the taking of testimony shall end. It has already appeared that Judge Brooke was satisfied from the evidence which had been offered that a jury ought to be called, and that the evidence which was proposed was cumulative, and would not change his opinion. As all this testimony might be offered before the jury, and later was offered, and the trial fully entered upon, we do not think the court lost jurisdiction by what was done.

The jury visited the premises. Complaint is made of instructions which are said to have been given to the jury limiting their inspection of the premises. Counsel says in his brief that in some way these instructions were left out of the printed record, but appear in the original transcript, as a reference will show, but does not say where in the transcript they may be found. Opposing counsel say no such instructions were given. The original transcript contains upwards of 550 typewritten pages, besides all the exhibits. The writer of this opinion has made a diligent effort to find the instructions which are said to have been left out of the printed record, and has been unable to do so. Under the circumstances he does not feel called upon to discuss further what is said by counsel upon that subject in the brief.

Counsel says:

"It did not appear in these proceedings at any time that the appellants asked an unreasonable price for the land, or that the appellee made a *bona fide* attempt to agree with them upon a price for the property desired."

This raises a question of fact. An offer of $100 an acre was made and refused. The company claimed this would fully pay the damage, while Mr. Hall claimed it was only a small part of it. A very large number of witnesses were called. Their testimony was as far apart as it could well be. The jury visited the premises. In view of this conflict, we do not feel called upon to review the action of

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the jury as to the questions of fact. See *Marquette, etc., R. Co.* v. *Longyear, ante,* 94 (94 N. W. 670), and the cases there cited.

Complaint is made of the charge of the court to the jury. Counsel says the court erred in his charge. We quote from the brief:

"To charge the jury, as a matter of law, that 'it has been repeatedly held that railroads are public necessities, and that the taking of lands for railroads is taking land for public use,' without any qualification, amounted to removing the question of necessity from the jury. * * *

"To say to the jury, 'Pay Mr. Hall what the land is worth, and pay Mr. Bewick what the land is worth, and no more than it is worth; that is all they are entitled to,' —limited the jury in their award of damages, and more than likely accounts for the small award, $100 per acre. By it the jury would understand they were to give no damages for anything on the land or under the land, and no damages for any change in the manner of conducting the quarries that would, as the uncontradicted evidence shows, becomes necessary as a result of taking the property."

These statements, taken by themselves, removed from the remaining portion of the charge, do not give a proper impression of its effect. The judge charged the jury, among other things:

"The first question for you to determine is whether it is necessary to take this land for public use. The law says that a man shall not be deprived of his land unless he sees fit to part with it, unless that land is necessary for a public use. It has been repeatedly held that railroads are public necessities, and that the taking of land for a railroad is taking land for a public use. It is for you to determine whether this land is necessary to be taken by this railroad, and whether it is for the benefit of the public to have an additional railroad constructed from Toledo here. The various reasons assigned by the different parties on this question you have heard. It is claimed on the part of some that any number of railroads between here and Toledo would be a benefit to the public, and by the public is meant, not the parties immediately adjoining this railroad, but the public that are to be convenienced by the

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operation of this road either in carrying freight or in carrying passengers. If you shall determine that the construction of this road is a matter of public necessity, and that the public will be benefited by it, then you have a right to determine if this road is necessary for public use; and, if it is necessary for public use, they have a right to condemn this land under what is known as the right of eminent domain. That is the first question you have to determine. * * *

"Now, its value is simply what it is worth, taking into consideration any injury that it may do to the party who owns the land; that is, to the land that is left. If this line cut right through the middle of a man's farm, destroyed his house, cut him off from his corn, cut him off from the highway, or anything of that kind, those circumstances would all be necessary and proper for you to take into consideration for the purpose of determining not only the value of the land, but the injury it might do him in taking that land. If it is taken off the lower end of his farm, or some place where it does not prevent him from having easy access to the highway, then it would damage him less; and all those matters are matters for you to take into consideration in fixing the value of this land, which is what it is worth, and what damage it may do to the property that may adjoin or that may be left."

We have quoted enough from the charge to show the jury were properly instructed upon the two principal questions in the case.

The other objections made to the award and its confirmation by the judge have been considered, but we do not deem it necessary to discuss them.

One question remains to be considered. Section 6240, 2 Comp. Laws, provides that the court shall allow the owners of land condemned, in addition to the damages and compensation awarded by the jury, a reasonable attorney fee, to be fixed and determined by the court when the report or verdict is confirmed. The judge allowed $100 as an attorney fee. The trial of the case lasted from September 5th to September 12th, inclusive. Counsel spent much time before Judge Brooke before an order for a jury was made. He also appeared in the proceeding before Judge Hosmer, and spent time interviewing the

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witnesses and looking up the law applicable to the case. A party whose land is sought to be condemned has a right to contest its condemnation, and to employ counsel, and the statute contemplates the counsel shall be paid a reasonable amount for his services. Speaking for myself, I think the amount the attorney was allowed in the court below was too small; but it does not follow that, because of that, the award should fail.

This situation presents the question as to whether or not an appeal is allowable from the order of the circuit judge fixing the amount of attorney's fees, and, if allowable, whether or not this court will review the action of the circuit judge in exercising his discretion. We have asked counsel to furnish us with briefs upon this proposition, and they have complied with this request; but the diligence of counsel has not enabled them to find any authority for an appeal in proceedings of this character except that conferred by section 6248, 2 Comp. Laws, which provides, among other things, that:

"Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal or report of the commissioners or jury."

It will be observed there is no provision in the statute for an appeal from the order of the judge making an allowance for an attorney fee. This would indicate the legislature deemed the judge before whom the proceeding was had better qualified to pass upon that question than would be a tribunal before whom all of the proceedings would not appear in the record, and intended to make the action of the trial judge final.

The award made in the court below is confirmed, with costs to appellee.

The other Justices concurred.

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CHAPMAN v. PERE MARQUETTE RAILROAD CO.

RAILROADS—INJURY TO EMPLOYÉ—SAFE APPLIANCES—CONTRIBUTORY NEGLIGENCE—DIRECTION OF VERDICT.

A railroad brakeman was injured while operating a lever used in connection with a semaphore signal. It was a cold night. He had a lantern in his left hand. He stooped over, and with his right hand drew the pin which held the lever down. When the pin was pulled, the lever flew up, and struck him on the head. If he had put his foot or hand on the lever, the accident would not have happened. It was his claim that the upper wire of the device was unnecessarily taut. *Held*, error to refuse to direct a verdict for defendant, the appliance being reasonably safe, and the brakeman not having used proper care.

Error to Saginaw; Beach, J. Submitted January 6, 1903. (Docket No. 6.) Decided May 29, 1903.

Case by Claude H. Chapman against the Pere Marquette Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellant.

James H. Davitt, for appellee.

MOORE, J. Plaintiff was a brakeman on the Pere Marquette Railroad, and a verdict was rendered in his favor for injuries received while operating a lever used in connection with a semaphore signal in the Saginaw yards. The case is brought here by writ of error by the defendant. Its claim is the court should have directed a verdict in its favor.

At the south end of the Saginaw yards of the Pere Marquette Railroad is a semaphore signal for the purpose of preventing collisions between the trains and switch engines

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which pass that point and operate in that vicinity. No train can pass into the Saginaw yards from the south except when this semaphore signal shows a clear main track. No train can pass from the switching yard to the main line without the semaphore signal being so set as to warn other trains. The movement of a train from the main line to the side tracks also requires the movement of the signal. The semaphore signal is operated by a lever situated on the ground in the yard about 1,200 feet from the signal, the two being connected by two wires running along the tracks. One of the wires pulls the semaphore to "clear" and the other pulls it to the semaphore post. At the lever the wires are attached to a chain, which passes over a wheel to which the lever is attached. The lever moves in a half circle, drawing on one wire, while the other at the same time is slackened. When down, it is held in place by an iron pin passing through two jaws on each side of the lever, in holes just above the lever. This pin must be removed before the lever is operated. Photographs of the lever aid in understanding its operation and construction. The lever not only operates the semaphore signal about 1,200 feet away, but its operation also locks or unlocks the switch near it. A rod from the lever runs to and locks the switch, thus preventing a brakeman from opening the switch until he has first changed the semaphore by the use of this lever, thus warning other trains that the main line is not clear. The head brakeman (on a train entering Saginaw from the south, and desiring to pass from the main line to the yard tracks) goes to this lever, removes the pin which holds it down, turns the lever clear over, thereby setting the semaphore signal, and by the same movement unlocking the switch close by the lever. He then turns the switch, his train passes in, and, when it has entirely passed, the rear brakeman closes the switch, and, with the lever, resets the semaphore signal to "clear."

Plaintiff was head brakeman on a freight train from Port Huron to Saginaw, which entered the Saginaw

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yards about 3 a. m. on March 6, 1901. It became his duty to change the lever so as to shift the signal and turn the switch, to enable his train to cross over from the main track to the yard. It was a cold night. He had his lantern in his left hand. He stooped over, and with his right hand drew the pin which held the lever down. He did not put his hand or his foot on the lever to prevent it from flying up. When the pin was pulled, the lever flew up, struck the plaintiff on the side of the head, and hurt him severely. He had not operated this lever before.

It is the claim of the plaintiff that the upper wire was drawn unnecessarily taut, making it dangerous to operate the lever, and he gave testimony tending to show that two or three other levers of a similar character, one of which was in the same yard, did not fly up when operated in the way he operated this one. It was the claim of defendant that the operation of the semaphore required there should not be too much slack in the wires running to it; that the other levers were differently situated from this one; that the way to operate the lever was to grasp the end of it with the hand, and then release the pin; and that, if the plaintiff had properly operated it, he would not have been hurt.

The testimony and the photographs show the mechanism was a simple one. The lever was held in place by a pin. When the pin was withdrawn, the lever was moved by the hand nearly half way around the arc circle, and held in place by a pin put over it. All the testimony, including that of plaintiff, discloses that, if plaintiff had put his foot or his knee or his hand upon the top of the lever before withdrawing the pin, the accident would not have happened. We think it clear the appliance was reasonably safe, and that, if plaintiff had exercised such care as is due from an employé to his employer, the injury would not have occurred. See *Brewer* v. *Railway Co.*, 56 Mich. 620 (23 N. W. 440); *Lamotte* v. *Boyce*, 105 Mich. 545 (63 N. W. 517), and cases cited therein. Under the facts dis-

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closed by the record, a verdict should have been directed in favor of defendant.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

PUGH *v.* SCHINDLER.

1. EJECTMENT—BOUNDARIES—ISSUES.
   In ejectment, involving the true boundary line between plaintiff's and defendant's lands, situated, respectively, to the south and north of the east and west quarter line of the section, both parcels being bounded on the west by the north and south quarter line, the question as to the exact location of the latter line was immaterial.

2. SAME—INSTRUCTIONS—BURDEN OF PROOF.
   A statement by the court in such action, that "it will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, *without some proof* of its being a true line, located and fixed by the government survey," was not misleading, where the court had already charged that plaintiff's claim could only be established by a preponderance of the evidence.

3. SAME—OLD FENCES.
   A request to charge that a crooked fence of long standing, dividing the respective parcels, was better evidence of the boundary line between them than a recent survey, was properly refused, especially where there were traditions and alleged agreements on the assumption that it was not the boundary line, and where, moreover, counsel themselves stated that there never was a government line run, but that the practice was only to fix and establish quarter posts on the outside and at the center of sections.

4. SAME—APPEAL—OBJECTIONS NOT RAISED BELOW.
   An objection of a variance between the declaration and the verdict in ejectment in the description of the premises will not be considered on appeal, where not raised in the lower court or supported by an assignment of error.

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Error to Kent; Perkins, J. Submitted January 16, 1903. (Docket No. 56.) Decided May 29, 1903.

Ejectment by John A. Pugh against Charles Schindler and others. From a judgment for plaintiff, defendants bring error. Affirmed.

Rodgers & Rodgers, for appellants.

Ward & Brown, for appellee.

HOOKER, C. J. This is an action of ejectment. The parties own adjacent lands; the plaintiff having the original title to a parcel of 15 acres in the northwest corner of the southeast quarter of the section, while the defendants have the original title to the northeast quarter of the same section. The dispute arises over the location of the east and west quarter line, which separates the parcels, and the north and south quarter line, which marks the western limit of the disputed parcel. Only a few rods of land are involved. A fence has separated these tracts for many years. The plaintiff claims that this fence is not upon the true line, and that it was built and has been maintained upon an agreement that it might not be accurate, and that it should be subject to change when a proper survey should establish the true line. Plaintiff claims that such a survey has now been made, and that it marks the northern and western boundaries of the disputed strip, while the old fence marks its southern limits. The defendants claim (1) that the alleged survey is not correct, and does not show where the true line is; (2) that the fence is on the true line; (3) that, irrespective of the question of the location of the true line, the occupancy was never upon the understanding alleged by the plaintiff, but has been adverse. The plaintiff recovered a judgment, and the defendants have appealed.

It is manifest that the jury must have found that the survey shown by the plaintiff was correct, and established

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the true quarter lines. A number of questions relate to this subject. The real controversy between these parties is whether the defendants' fence is too far south. The jury found that it was, and there was testimony from which it might be found. We think the court did not err in submitting the question to the jury.

The description in the declaration is, "A strip of land, about thirty-one feet in width north and south, and twenty rods in length east and west, in the northwest corner of the southeast quarter of the section." The defendants now contend that there is a question concerning the eastern and western boundaries in the case, growing out of an alleged uncertainty as to the north and south quarter line. There was testimony regarding two stakes on the north side of the section, about six feet apart. This would make a variation of about three feet at the center of the section. The description in the declaration is perfect, and extends to the center of the section (*i. e.*, to the north and south quarter line, wherever it is), and we understand that the west line of each party's property has that line for a boundary, wherever it is. If it is farther west than defendants claim their land to extend, we do not see that the defendants are losers. The verdict described the land substantially as it was described in the declaration, though more definitely. It is manifest that if the defendants surrender the strip of land upon the north side of plaintiff's land, which is the real matter in controversy, there will be no confusion. They will not be expected to give up land to the west of the west line of their property, nor east of the east line of plaintiff's inclosure; and we think the controversy over the north and south quarter line of no importance. It is a technical question, without substance, especially in view of the fourteenth request, and the offer of counsel, made at circuit and renewed here, to waive the three-foot strip off from the west end of the lot. This disposes of the alleged errors in relation to testimony and requests involving the north and south quarter line.

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The court is said to have erred in stating that "it will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof, as I have said, of its being a true line, located and fixed by the government survey." It is contended that he should have said "established by a preponderance of the evidence." As he had already instructed the jury that the plaintiff's claim could only be established by a preponderance of the evidence, we think that they were not misled.

Counsel ask us to reverse the judgment because the court erred in instructing the jury that the defendants claimed that "the fence, as now standing upon the premises, is located upon a line which would be indicated by the government survey dividing these parties' lands; in other words, that the true line is where this fence now stands." They say:

"This was a clear mistake. We never claimed that our fence was on the true line as located by the government survey, and in fact were very strenuous throughout the entire trial in claiming that no one at this late day knows or has any way of finding out where the government surveyor located that line, and consequently that our fence is the best evidence of where the line is."

The latter quotation falls little short of claiming the old fence to be upon the true line, and, if it is not sufficient, the judge was authorized to understand such claim to be made from defendants' fifth request, upon a refusal to give which error is assigned. It is enough to say of this that there was some evidence that it was not upon the true line, and it was not for the judge to say, impliedly or otherwise, that there was not. Again, the contention that the judge should have practically decided the case, by saying that this crooked fence was better evidence of the line in its entirety and at all points than a survey made lately, was properly refused. There was not only a deviation from the direct, that is inconsistent with the theory of a correct line, but there were traditions and alleged agree-

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ments upon the assumption that it was not. Moreover, counsel themselves state that there never was a government line run, and that the practice was only to fix and establish quarter posts on the outside and at the center of sections. If this is true, the essential thing was to establish the quarter posts; and there would be no presumption that the fence, as a whole, was upon a true line, if it was a crooked fence. The crooked line might become the established line by adverse possession, but it could never be the original or true government line, because none was actually run, and theoretically the true line would be straight. This might not be true of lines actually run by government surveyors.

It is said that the court erred in saying that it was claimed that the fences east and west started at quarter posts when built. It is said there was no testimony tending to show where the west fence started from. The charge does not state what the testimony was in that regard, and the whole question was left to the jury upon such evidence as there was as to where the quarter posts were. There was no error in this, or in stating the claim of the plaintiff.

The point is made that the judgment is erroneous because the description varies from the declaration. The verdict is as follows:

"Commencing at the center of the section 32, running east 307.3, thence south 28 feet, then west 307.3, then north 33 feet to the place of beginning."

The declaration describes the land as a strip about 31 feet wide, so that there is a variance of a wedge-shaped piece, 2 feet wide on the west end, and extending east to a point less than half-way to the east end of plaintiff's tract. We have frequently held that the verdict must follow the declaration as to description, or that, at least, the declaration must cover and include the land recovered. Had this been brought to the attention of the trial court, he would doubtless have permitted an amendment, which would

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have been within his authority. No question was raised by defendants, that we discover, until the case reached this court, and we find no assignment of error that raises the question.

We think there is no occasion to discuss other assignments of error.

The judgment is affirmed.

The other Justices concurred.

GRAY v. SEELEY'S ESTATE.

ESTATES OF DECEDENTS—ALLOWANCE OF CLAIMS—LIABILITY OF ESTATE—SERVICES RENDERED TO DECEDENT'S WIDOW.

Where a testator bequeathed to his wife his estate for life, and then to his children, accounts for medical services performed for the wife after the testator's death were not proper charges against his estate, though his executor received, during the lifetime of the wife, rents of the estate which belonged to her, and expended them for the use of the estate, but such accounts were debts due from the widow, collectible on her death from her estate.

Error to Oakland; Smith, J. Submitted February 3, 1903. (Docket No. 61.) Decided May 29, 1903.

Mason W. Gray, also Franklin P. Galbraith and William McCarroll, copartners as Galbraith & McCarroll, presented claims against the estate of Zachariah L. Seeley, deceased, for medical services rendered to decedent's widow. The claims were allowed in the probate court, and George E. Seeley, executor of the estate, appealed to the circuit, where claimants again prevailed, and defendant brings error. Reversed.

John D. Harger, for appellant.

Patterson & Patterson, for appellees.

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HOOKER, C. J. At the time of his death, in 1891, Zachariah L. Seeley owned a farm worth $2,950, subject to a mortgage of $800. He died testate, and his will was probated in June, 1891, his son George E. Seeley being appointed executor. The second, third, and fourth clauses of the will are as follows, viz.:

"*Second.* I give, grant, and bequeath to my beloved wife, Julia Seeley, should she survive me, the use of all my estate, both real and personal and mixed, so long as she shall live, and, after her death,—

"*Third.* I give and bequeath to my son, Llewellyn Seeley, of West Bloomfield, Oakland, the sum of five dollars, having already given him a portion of my estate.

"*Fourth.* I give, grant, and bequeath the remainder of my estate to my sons and daughters, and should either of my said sons or daughters decease, leaving heirs of their body them surviving, then the share of such deceased one or more is to be paid to such heir or heirs."

Some 15 months after the testator's death, Galbraith and McCarroll, who are physicians, began rendering professional services to Mrs. Seeley, and these services amounted to $73.25. Gray began treating her some four years later, and his charges are $131. Mrs. Seeley died, and afterwards petitions were filed by the parties for their respective claims against the estate of Zachariah L. Seeley in probate court, and upon a hearing the claims were allowed. An appeal was taken by the executor, and the orders of the probate court were affirmed in the circuit. The two cases were presented as one in this court. The findings of fact were similar, except that, in the case of Gray, the widow handed him $1 when he made his first visit, and said:

"This is all I can pay. It is so fixed that when I am gone you will get your money, every dollar of it."

No such payment or promise was found in the other case. It was found further in both cases that the executor had control of the property up to the time of trial; that he continued the tenant on the farm, who was there when Seeley died, for a time, and then leased it to one

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Wright, who remained there until the widow's death. Of the money received as rent, the widow received $30 per year, the executor $55, and this occurred for seven years or more, and it did not appear whether the widow was willing that he should receive this money or not. The findings of law are, in substance:

1. The husband's estate is not liable for medical attendance furnished to his widow, nor for necessaries furnished to her.
2. Her statement that the estate will pay for such will not of itself make the estate liable.
3. The rent received by the executor belonged to the widow, and he has expended it for the estate, or must account for it; and the probate court may follow such fund, and allow these claims, if their aggregate does not exceed such fund.

It is clear that the accounts of these plaintiffs are not legitimate charges against the estate of the deceased husband, and that they are debts of the widow, and could be collected from her estate, if she left one. If the executor of her husband's estate has earnings of the property to which she was entitled, or if she was entitled to have her debts paid out of his estate under a proper construction of the will, her administrator has a valid claim against the executor for the necessary amount, and these are assets of her estate. To obtain them an administrator of the widow's estate would be necessary, and the plaintiffs' claims would have to be presented and allowed as against her estate before the administrator could be safe in paying them. There is no privity between the plaintiffs and the executor of the husband's estate.

The judgments are reversed. Judgment will be entered upon the findings in favor of the defendant in each case for costs of both courts.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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BARR *v.* GUELPH PATENT CASK CO.

INJURY TO EMPLOYÉ—NEGLIGENCE—QUESTION FOR JURY.
Case ruled by former decision, 129 Mich. 278.

Error to Benzie; Chittenden, J. Submitted February 5, 1903. (Docket No. 73.) Decided May 29, 1903.

Case by Emma Barr, administratrix of the estate of Daniel Barr, deceased, against the Guelph Patent Cask Company, for the alleged negligent killing of plaintiff's intestate. From a judgment for plaintiff, defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark, for appellant.

Charles A. Withey (*D. G. F. Warner*, of counsel), for appellee.

MOORE, J. This case has been tried twice. Upon the first trial the circuit judge directed a verdict in favor of the defendant. An appeal was taken to this court, which ordered a new trial. Upon the second trial a verdict was rendered in favor of the plaintiff. The defendant brings the case here by writ of error. The opinion rendered in this court when the case was here before is found in 129 Mich. 278 (88 N. W. 640). A reference to that opinion will make it unnecessary to make a long statement of the case here.

Upon the second trial, in addition to the testimony offered upon the part of the plaintiff, testimony was also introduced upon the part of the defendant, and it is claimed on the part of the defendant the record which we now have differs from the record when the case was presented here before. It is true that the trial judge, upon the objection of defendant's attorneys, declined to admit some of the testimony on the part of the plaintiff which was received

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upon the former trial. It is also true that testimony was offered on the part of the defendant, when none was offered before. This had the effect of presenting a weaker case on the part of the plaintiff, and a stronger case on the part of the defendant; but it did not wholly eliminate the questions of fact, and a careful comparison of the two records does not indicate any material difference, except in degree, in relation to the question of fact which was involved. Many of the cases cited by counsel were cited in the former briefs, and some of the same arguments used then are used now. A careful reading of the present record satisfies us that now, as when the case was here before, the proofs disclose a case which should be submitted to a jury. It would not do any one any good to review the record in detail. See former opinion and *Brown* v. *Railroad Co.*, 118 Mich. 205 (76 N. W. 407). The trial judge submitted the case to the jury under a very careful and impartial charge.

The judgment is affirmed.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

PAGE WOVEN WIRE FENCE CO. *v.* POOL. 133 323
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1. BILLS AND NOTES—LOST INSTRUMENT—PAYMENT TO HOLDER AFTER NOTICE.

Payment of a note by the maker after notice that the instrument has been lost, though the note be payable to bearer, does not extinguish the liability thereon, unless the person presenting it for payment be required, before payment, to prove his title thereto.

2. SAME—PRESUMPTIONS—BURDEN OF PROOF.

The maker of a note was notified by the payee that it had been sent to a bank for collection. She called at the bank, where the cashier told her that it had not been received, and had

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probably been lost in transit. He nevertheless requested her to pay it, which she declined to do without its production. She subsequently claimed to have paid the note to one representing himself to be the agent of the payee. On the trial of an action on the note it was produced by the maker, at which time it bore the indorsement, "Pay to the order of any bank for collection and remittance" to the payee. *Held*, that the presumption of an authorized payment of the note, arising from its possession by the maker, was overcome, rendering it incumbent upon her to prove a payment under such circumstances as would discharge her from liability.

MOORE and GRANT, JJ., dissenting.

3. SAME—INDORSEMENT FOR COLLECTION—EFFECT.

The mere indorsement of a note to a bank for collection does not prevent the payee or his agent from demanding and receiving payment thereof.

Error to Montcalm; Wiest, J., presiding. Submitted February 17, 1903. (Docket No. 78.) Decided May 29, 1903.

Assumpsit by the Page Woven Wire Fence Company against Phœbe M. Pool on a promissory note. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Herbert R. Clark and *L. C. Palmer*, for appellant.

V. H. & H. H. Smith, for appellee.

MOORE, J. On September 28, 1899, Phœbe M. Pool, of Montcalm county, Mich., gave to the Page Woven Wire Fence Company an instrument which reads as follows:

"$200.

"GRAND RAPIDS, STATE OF MICHIGAN, Sept. 28, 1899.

"Ninety days after date, I, of Lakeview post-office, residing in the town of Cato, county of Montcalm, State of Michigan, for value received, promise to pay to the order of the Page Woven Wire Fence Co., or bearer, without default, two hundred dollars, payable at Lakeview Bank, with exchange and collection charges. Interest at seven per cent. until paid.

"Residence, 4½ miles S. E. of Lakeview post-office.

"PHŒBE M. POOL."

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About the 23d of November, 1899, a letter of transmittal for the same was written and addressed to the Farmers' & Merchants' Bank of Lakeview, Mich. At the same time a letter addressed to Mr. Philo M. Pool, Lakeview, Mich., was written, to notify the debtor that the obligation had been sent to the bank. It is claimed the Farmers' & Merchants' Bank of Lakeview did not receive the letter of November 23d, nor did it ever receive the note in question. The note was never seen by the plaintiff again until seen in the hands of the defendant. December 1st, eight days after the writing of the letter to Philo M. Pool, a letter was written by plaintiff, addressed to Phœbe M. Pool. This letter was received by her. Six days thereafter Mrs. Pool addressed a letter to E. E. Metcalf, the indorser of the note, at Grand Rapids, Mich., saying that the debt would be paid. Some time after November 23d, the Page Woven Wire Fence Company wrote to the Farmers' & Merchants' Bank of Lakeview, advising them that they had sent a collection against Mrs. Pool to the bank about the 23d of November. Upon receipt of this, Mr. Sorensen, for the bank, examined his files, and wrote the company he had no such collection, and had never had it.

Some time in December Mrs. Pool was in the bank, and talked with Mr. Sorensen about the note. He told her he thought it was lost, and requested her to pay it and take a receipt for it, which she refused to do, and stated she would not pay it until it was produced. Upon the 12th of January, 1900, the company wrote again to Mrs. Pool, asking her to pay the note, and suggested that it may have been lost. Upon receipt of this letter she wrote them she had paid it on the day it came due "to your man Lamb," at her home. Upon receipt of this letter, the company wrote Mrs. Pool on January 24th, expressing their surprise that the note had been presented to her, and asking for full particulars about the transaction. Upon March 21st the cashier of the company wrote Mrs. Pool he would call upon her about this matter, and shortly thereafter he did, when Mrs. Pool showed him the note in question, from

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which her name had been torn off. He made a copy of it and took it away with him. She told him of the circumstances connected with the payment of the note, how much she had paid, where she got the money, that she borrowed part of it, and described the man Lamb, to whom she had paid it. She said she paid it about dusk the 27th of December in her home; that there was one man in the room when she paid it, and another outside, in the carriage.

It is to recover upon this note this suit was brought. After plaintiff put in its proof, a motion was made to direct a verdict for the defendant. The judge was of the opinion that the presumption surrounding the payment by the defendant because of her possession of the note had not been overcome, and directed a verdict in favor of the defendant. The case is brought here by writ of error.

It is conceded that the only question is whether the plaintiff introduced sufficient proof to shift the burden to the defendant to show she made payment under such circumstances as would protect her. It is conceded that possession of a promissory note by the maker is presumptive evidence of its payment, but it is said the presumption is not conclusive, and, as the maker of this note had notice of its loss before she paid it, she should have required the person presenting it to establish his title to it before paying it. It is also contended that the note is nonnegotiable, for two reasons: (*a*) Because of the words "with exchange and collection charges;" (*b*) because of the indorsement on the back, "Pay to the order of any bank for collection and remittance to Page Woven Wire Fence Company, Adrian, Michigan,"—and that the payment of it to a stranger was made at the peril of the payor.

The case of *Cothran* v. *Collins*, 29 How. Prac. 113, resembles this case in many ways. In that case it was said:

"These exceptions present the question whether payment of a note, which has been lost or stolen from the owner, by the maker to the finder or thief, without fraud, in other words, under the belief that he was the true

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owner, but under circumstances showing that the maker was grossly negligent in not learning the facts, and which would have excited suspicion in an ordinary person, is available as a defense against the real owner. The judge upon the trial held, and so instructed the jury, that such payment constituted a defense against the owner. Such I understand to be the fair construction of the charge. The plaintiff insists as one ground why such payment is not good that it was made after the note became due. It is well settled that a party purchasing a note or bill after the same becomes due takes it subject to all defenses the maker or other parties would have against the party from whom he purchases. But this doctrine, I think, has no application to payment made to a party in possession by the party liable. The rule as to a purchaser is founded upon a presumption that valid notes or bills are paid by the parties liable thereon at the time they become due, and that nonpayment at that time is notice to all subsequently acquiring title to the paper that the same is for some reason invalid, or that there is no subsisting cause of action thereon. But the maker of a note has no reason for supposing, from the fact that he has not paid the same when due, that the title of the possessor is invalid. Indeed, notes are very rarely paid before due, and cases of presentment for payment before that time are still more rare. * * * .

"We have seen that notes are not paid until or after due, usually, and there is surely as much reason that the party liable should be unembarrassed in making payment, and that he should be protected in paying to one in possession, and *prima facie* entitled to receive it, as that a purchaser in the usual course of business, for value, should be protected in his title. Indeed, if any distinction should be made, I think the rule should be more favorable to the party making the payment. He must act at once, not only to preserve his credit, but to protect himself from the trouble and expense of a suit, while the purchaser would merely lose a bargain."

See, also, *Davis* v. *Seeley*, 71 Mich. 209 (38 N. W. 901).

We do not deem it necessary to decide whether the paper given by Mrs. Pool to the plaintiff was a negotiable note or a contract. It was made payable to the plaintiff or bearer, payable at the Lakeview Bank, with exchange and collection charges. Mrs. Pool was notified it had been

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sent to the bank. She was at the bank, and was there informed it had not been received by the bank, and was requested to pay it. She indicated her willingness to pay it, but declined to do so unless the note was produced. At the date of its maturity this paper, payable to bearer, was brought to the house by a man who claimed to be the agent of the company; and Mrs. Pool, if her statement to the cashier is to be believed (and there is no other version of what occurred), paid to this agent the full amount due upon the note, and it was delivered to her. We do not think this statement of facts tended to overcome the presumption of payment arising from the production of the note by Mrs. Pool. See *Page Woven Wire Fence Co.* v. *Pool*, 129 Mich. 57 (87 N. W. 1043); 3 Rand. Com. Pap. (2d Ed.) § 1475.

Judgment should be affirmed.

GRANT, J., concurred with MOORE, J.

MONTGOMERY, J. The facts are stated in the opinion of my Brother MOORE. It should be added that no evidence was offered on behalf of defendant, so that the question whether she paid the note in fact, and the circumstances under which she made payment, rest entirely upon her own unsworn statements made to the cashier of the company.

It is the contention of the defendant, as we understand it, that, having produced the note, the presumption of an authorized payment arises, and that, before this presumption can be overcome, the burden rests upon the plaintiff to show that the payment was actually made in bad faith. The case chiefly relied upon to sustain this contention is the case of *Cothran* v. *Collins*, 29 How. Prac. 113. The case is an extreme one, but, if followed, does not rule the present case. In that case there was no evidence that the defendant had any notice whatever that the note in question had been lost. The same thing is true of *Greve* v. *Schweitzer*, 36 Wis. 554. The present case presents a very different question. It is stated in the text-books as

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elementary law that, where notice that an instrument has been lost or stolen has been brought home to the maker, payment thereafter made will not extinguish liability, unless the party presenting the instrument is required, before payment, to establish title thereto. 2 Daniel, Neg. Inst. § 1461; Byles, Bills, 378; 2 Pars. Notes & B. 256. See, also, *Hinckley* v. *Railroad Co.*, 129 Mass. 52 (37 Am. Rep. 297), which is a very instructive case, and the whole subject is discussed; *Bainbridge* v. *City of Louisville*, 83 Ky. 285 (4 Am. St. Rep. 153).

We are unable to see any good reason for denying the equity of this rule. Where one of two innocent parties must suffer, the law casts the burden upon him who is guilty of a want of diligence or care. And in case of a lost instrument it is difficult to see what more the owner of the bill may do than to bring home notice to the maker of the fact of such loss, thus bringing to his knowledge that the instrument is likely to be presented by one not entitled to receive payment thereon. If, with such information, no duty of care is cast upon the maker, and nothing short of absolute *mala fides* will invalidate a payment made, the law affords little protection to the payee; and most emphatically is this so if, when knowledge of the loss is brought home to the maker, the bare possession of the note is sufficient to render recovery impossible, for such is the effect of declaring that actual *mala fides* must be shown. In the present case it is true that no notice was received by the maker of the loss of the instrument, prior to the payment, direct from the payee of the note, but she had this notice. Notice was sent her of the fact that the note had been mailed to the bank, and the cashier of the bank had informed her that the note had not been received at the bank, and that it probably was lost in transit; and, when the note was presented to her for payment, it had the indorsement on the back, "Pay to the order of any bank for collection and remittance to Page Woven Wire Fence Company." Was this sufficient notice that the note had been lost? We think it was. The defendant

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had notice of every fact which, if true, showed the loss, to wit, the mailing of the note to the bank, the failure of the bank to receive it, and, furthermore, the statement of the cashier of the bank to her that he thought the note was lost, and a request by him for payment without the production of the note. The defendant therefore occupies the position of one paying a note to one not authorized to receive it, having notice of its loss, and, so far as the record discloses, without any inquiry or investigation as to the title of the holder.

It is claimed that the indorsement of the note to a bank for collection was a restrictive indorsement, and that for this reason the defendant was not justified in making payment to this alleged agent of the plaintiff. We do not accept this view of the plaintiff. While the indorsement was a circumstance showing want of care on the part of the defendant, it is by no means conclusive, for it cannot be doubted that the payee of the note, notwithstanding that it bore the indorsement in question, would have the right to demand and receive payment. The record fails to disclose what care the defendant exercised in making payment to the holder, and, upon this record, we think it was error to instruct a verdict for the defendant.

Judgment will be reversed, and a new trial ordered.

HOOKER, C. J., and CARPENTER, J., concurred with MONTGOMERY, J.

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DURGIN v. SMITH.[1]

1. PROMISE ON BEHALF OF PROPOSED CORPORATION—PERSONAL LIABILITY.

Even if a promise that a corporation which the promisors contemplate organizing shall perform certain undertakings is not binding on such corporation, it not being in existence at the time, this does not make the promisors personally liable.

2. CONTRACTS—MISUNDERSTANDING—EVIDENCE.

That there was a misunderstanding between the parties as to what was agreed to between them can be deduced only from the language used, not from the testimony of one that his understanding was different from the claim of the other.

Error to Wayne; Brooke, J. Submitted February 18, 1903. (Docket No. 93.) Decided May 29, 1903.

Assumpsit by William B. Durgin against Frank G. Smith, Sr., and Frank G. Smith, Jr., upon an alleged promise to pay the debt of a third person. From a judgment for plaintiff, defendants bring error. Reversed.

Moore & Goff, for appellants.

Bowen, Douglas, Whiting & Murfin, for appellee.

HOOKER, C. J. A review of a former trial of this cause will be found in 115 Mich. 239 (73 N. W. 361), where an outline of the facts of the case can be found. Upon a second trial the jury rendered a verdict for the plaintiff, and the defendants have appealed.

The plaintiff's contention is that the defendants personally promised to pay plaintiff's claim against the insolvent corporation in consideration of plaintiff's promise to sell his goods to a new corporation, which the defendants contemplated forming. The defendants claim that their promise was not their personal promise to pay, but a

[1]Rehearing denied September 22, 1903.

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promise that such proposed corporation would pay. The testimony of the parties supported their respective claims. Plaintiff, having furnished goods to the new corporation, brought this action upon the contract, and the only important question was one of fact, viz., whose version of the oral agreement was true. The court submitted this question to the jury. He followed the charge proper by giving requests handed up by both parties; among them the following, viz., plaintiff's request No. 5:

"If you find that the defendants made a promise to pay to the plaintiff the existing indebtedness of F. G. Smith, Sons & Co., and the plaintiff on his part kept his promise to sell exclusively to the defendants, or such concern as they should thereafter organize, and even if you find that such promise was made with the intent on the part of the defendants to bind a corporation which they contemplated organizing thereafter, then, inasmuch as they could not bind such future corporation, having no authority to do so, they are individually liable on such promise so made, and your verdict should be for the plaintiff for the amount stated."

He afterwards gave defendants' ninth request, as follows:

"The plaintiff testifies that the defendants, Smiths, agreed to pay the old account, and pay interest at the rate of six per cent. semi-annually, and to pay in thirty days for all goods purchased, he on his part to sell them such goods as they wished, and to give them the exclusive sale of his goods. In order to make a valid contract, the minds of the parties must meet and agree upon the terms of the contract. If the jury find that the plaintiff and defendants did not agree as to the main features of the alleged agreement, the plaintiff cannot recover."

These requests are inconsistent with each other, and a jury would be likely to understand from the former that, although the defendants did not intend to bind themselves personally, and did not agree to do so, they would still be liable, because they could not bind the corporation, inasmuch as it was not yet in existence. We need not discuss the question whether it was possible to bind such corpora-

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tion. The substance of this request and instruction was that the jury must find this promise binding on defendants personally, whether they made a promise to pay personally or not. This was erroneous.

Several other questions are raised. It is contended by defendants that the request already held erroneous did violence to the rule that the minds of the parties must meet, to make a binding contract. If the testimony, taken as a whole, can be said to have justified the conclusion that there was a misunderstanding between the parties as to whether this was a promise that the defendants should pay, or that it should be an obligation of the new corporation only, the plaintiff had failed to prove a binding contract. Such a deduction could be drawn only from the language used, not from testimony of one of the parties that his understanding was different from the claim of the other. *Booth* v. *Bierce*, 38 N. Y. 463 (98 Am. Dec. 73); *Miller* v. *Lord*, 11 Pick. 11, 23; *Woollam* v. *Hearn*, 7 Ves. 211; *Higginson* v. *Clowes*, 15 Ves. 520; *Winchester* v. *Howard*, 97 Mass. 303 (93 Am. Dec. 93). We have not had called to our attention any evidence which justifies the conclusion that there was any such question in the case. It seems to have been a question of what was said, rather than what was intended by the parties; and in this connection it is proper to say that the questions covered by assignments 1 to 5, inclusive, were correctly disposed of. The letters mentioned show what they referred to, and it was not for the defendants to place a construction upon them by indicating an intention to admit only the liability of the corporation.

It is unnecessary to discuss other assignments.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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BIGELOW *v.* THOMPSON.

MORTGAGES—EQUITY JURISDICTION—INJUNCTION—ACCOUNTING.

Equity has jurisdiction to restrain the grantee in a timber deed intended as a mortgage from cutting the timber, and to ascertain whether the mortgage has been paid; and, an accounting having shown a balance due to complainant, a decree may be entered for its payment.

Appeal from Missaukee; Chittenden, J. Submitted February 20, 1903. (Docket No. 110.) Decided May 29, 1903.

Bill by William G. Bigelow against Henman A. Thompson and others to have a deed declared to be a mortgage, and for an accounting. From a decree for complainant, defendants appeal. Affirmed.

F. O. Gaffney, for complainant.

Smith, Nims, Hoyt & Erwin, for defendants.

HOOKER, C. J. The bill in this cause was filed by the grantor in a quitclaim deed of timber, to have it declared a mortgage and for an accounting, and to enjoin the grantee from cutting the timber. The defendant has appealed from a decree granting the prayer of the bill.

We are urged to reverse this decree upon the ground that the evidence that the deed was intended as security was not clear and convincing. While it is true that the defendant denies complainant's statement of the transaction, we think the circumstances tend to support the complainant's testimony, and that we should not disturb the finding of the circuit judge upon this point. He saw the witnesses, and the evidence may have been very convincing. We are satisfied that it clearly preponderates in complainant's favor.

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If it is true that the debt for which the deed was given as security has been paid, a court of equity has jurisdiction to restrain defendant from cutting the timber under a claim based upon it, and to ascertain whether it has been fully paid or not. An accounting is necessary, and, having ascertained that there is a balance due complainant, it is proper to determine the amount and decree its payment.

The result reached by the learned circuit judge is, in our opinion, justified by the testimony, and his decree is affirmed, with costs.

The other Justices concurred.

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MESHEW v. SOUTHWORTH.

1. SPECIFIC PERFORMANCE—CONTRACT—PLEADING AND PROOF.
   In a suit for the specific performance of a written contract, complainant cannot show that the contract is different from that set out in the bill.

2. SAME—VENDOR AND PURCHASER—TITLE—ABSTRACT—INCUMBRANCES.
   A vendor in a land contract, who was required by its terms to furnish an abstract showing a good and sufficient title, cannot enforce a specific performance thereof, where the abstract furnished was not brought down so as to show title in himself, and there was a mortgage on the premises, which was not discharged until after the commencement of the suit.

Appeal from Cass; Carr, J. Submitted February 24, 1903. (Docket No. 118.) Decided May 29, 1903.

Bill by Charles H. Meshew against Cena E. Southworth for the specific performance of a land contract. From a decree dismissing the bill, complainant appeals. Affirmed.

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Freeman J. Atwell (*Coy W. Hendryx*, of counsel), for complainant.

Charles E. Sweet (*Clyde W. Ketcham*, of counsel), for defendant.

MOORE, J. Complainant filed this bill in October, 1901, to obtain a decree for the specific performance of a land contract. From a decree dismissing the bill of complaint, the complainant has brought the case here by appeal.

The material portions of the written contract are as follows:

"This agreement, made and entered into this 10th day of August, 1901, by and between Charles H. Meshew, party of the first part, and Mrs. C. E. Southworth and husband, R. W. Southworth, parties of the second part, all of Dowagiac, Michigan, witnesseth:

"That the party of the first part, for and in consideration of the agreements hereinafter specified to be by the party of the second part performed, hereby agrees to convey to said party of the second part by warranty deed from Charles H. Meshew and wife, Elizabeth C. Meshew, the following described property situated in Dowagiac, Cass county, Mich., and being lots Nos. forty-one (41), forty-two (42), and forty-eight (48) in Meshew's Fair Ground Addition to the City of Dowagiac, according to the recorded plat thereof.

"And the party of the second part for their part, for and in consideration of the agreements above specified being by the party of the first part well and truly performed, do hereby agree to assign and deliver, or cause to be assigned and delivered, to said party of the first part, his heirs or assigns, an undivided one-half (½) interest in [a $1,600 mortgage]. * * *

"It is hereby further mutually agreed and understood by and between the parties hereto, and as part of the consideration of this agreement, that each party hereto is to provide for the use of the other, within ten days from the date hereof, proper abstracts of title of the property hereby agreed by them to be conveyed or caused to be conveyed, showing good and sufficient title to the same in the grantors herein mentioned; and also that each party shall pay all other costs incident to his part of the negotiation. All

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deeds to be passed, and this negotiation to be closed, within ten days from the time that examination of the aforesaid abstracts of title shall have been completed."

On the 16th of August, 1901, the complainant delivered to Mrs. Southworth the only abstract of title which he ever delivered to her. This statement of title was not brought down to any later date than September, 1899, and it was a statement of title to 23 acres off from the south end of the west half of the southeast quarter of section 31, town 5 south, range 15 west, excepting 1½ acres in the southwest corner thereof, formerly owned and occupied by Henry Clark, Wayne township, Cass county, Mich. It showed the title to this land was in the City Bank of Dowagiac. It did not show what conveyances, if any, or what changes, had been made in the title later than September 16, 1899. It did not show, and there is nothing in the record to show, that the land described in the statement of title was ever platted into lots, which plat was recorded.

On the 23d of August, 1901, Mrs. Southworth sent a letter to complainant, notifying him of her intention to rescind the contract, and stated:

"The grounds for such rescission are the failure on the part of said Charles H. Meshew and Elizabeth C. Meshew to perform their part of their contract which was to be performed within ten days after the same was entered into."

To this letter, complainant replied that he would not consent to a rescission of the contract; saying, among other things:

"If the abstract that I have furnished is unsatisfactory, I stand ready to satisfy you in any reasonable way upon your complying with your part of the contract, and showing wherein my abstract is unsatisfactory to you; in fact, I stand ready to comply with all the terms and conditions of our contract, and trust that I may not have to take steps to enforce specific performance upon your part."

On the 27th of August he made a warranty deed of the lots, and tendered it to Mrs. Southworth, and at the same

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time read to her a letter written by him, containing, among other things, the following statement:

"I am ready to deliver this deed to the aforesaid lots at any time up to and including August 30, 1901, provided you have satisfied me that your title to the property that you are to convey is or can be made perfect at the time that you transfer the same to me. I am ready to comply with any reasonable request that you may make with reference to the title to the property that I herein propose to convey, and do convey by the warranty deed herewith submitted. You will find that the aforesaid lots are covered by a mortgage held by the City Bank, which mortgage recites that upon the payment of $60 per lot they will discharge said mortgage as to those particular lots. You may verify this by conferring with F. W. Lyle of the aforesaid bank."

He has never made to her any other tender of a deed. Mrs. Southworth declined to accept the deed so tendered. At the time this deed was tendered, the bank had a mortgage calling for the payment of $60 on each of these lots. It appeared upon the trial that by two deeds the title to the 23 acres which the bank had owned was conveyed to the complainant on the 18th of December, 1899, but the bank still held a mortgage on said property. There is nothing in the record to show that these two deeds were ever called to the attention of the defendant until they were filed in evidence in this case upon the trial, May 17, 1902. The record shows that the mortgage on said lots was not discharged of record until the 13th day of March, 1902.

It is the claim of complainant that, at the time the contract was drawn, there was an oral understanding with reference to the obtaining of the discharge of the mortgage from the bank at the time the papers were exchanged between the parties to the contract, and it was sought to establish an entirely different contract, by parol, from the written contract which is sought to be enforced. We think it hardly necessary to suggest that, inasmuch as this is a bill asking a specific performance of a written contract,

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if there was no other rule of law which would forbid the setting up of another contract, it could not be done in this proceeding. Without going into detail as to what is disclosed by the oral testimony, we have recited enough from the record to show that complainant has never performed what he agreed to perform by his written contract, and that he was not the owner of the land in controversy, free from all incumbrance, at the time he made a conditional tender of the warranty deed, and that it was not until long after this bill was filed that he obtained a discharge of the incumbrance which was upon the lots which he had agreed to sell to the defendant. The facts disclosed by the record do not call for any discussion of legal principles.

The decree of the court below is affirmed.

The other Justices concurred.

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HOGADONE v. GRANGE MUTUAL FIRE-INSURANCE CO.

1. DEEDS—RECORD—NONDELIVERY—INTENT TO PASS TITLE—FIRE INSURANCE—BREACH OF CONDITION OF POLICY.

   Where a deed is executed and recorded, but not delivered, and there is no intention on the part of the grantor that title shall pass, it does not do so. Such circumstances, therefore, do not constitute a breach of a condition of a fire policy against any "change of title or ownership" of the property insured.

2. SAME—EVIDENCE—FINDINGS OF COURT.

   Upon an issue whether title had passed by plaintiff's deed to his wife, which he had caused to be recorded but had not actually delivered, he testified that the deed was made with intent to transfer the property, and that, when he placed it on record, he understood that he had transferred the property, and that the title was then in her; but he also testified that he did not intend to give her the property and release his claim to it, and that his only object was to get the record title out of his name, so as to ward off creditors. *Held*, to justify the court in refusing to find an intent to pass title.

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3. FIRE INSURANCE—MUTUAL COMPANIES—PROVISION FOR ARBITRATION—CONSTRUCTION.

A provision in a fire policy issued by a mutual company, to the effect that, in case of disagreement "as to the amount of valuation, in whole or in part, said matter in difference shall be determined by the arbitration committee," whose decision as to "the justness or validity of such claim" shall be final, and preclude any suit "to fix such amount or valuation," relates only to cases of disagreement as to the "valuation," and is not applicable to a controversy between the parties in which the validity of the claim against the company is in question.

Error to Kent; Perkins, J. Submitted April 7, 1903. (Docket No. 3.) Decided May 29, 1903.

Assumpsit by George P. Hogadone against the Grange Mutual Fire-Insurance Company of Kent and Ottawa counties on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Lombard & Hext, for appellant.

E. J. Adams and *Colin P. Campbell*, for appellee.

CARPENTER, J. Plaintiff recovered a judgment of $600 in the court below for loss under an insurance policy issued by defendant. The trial took place before the court, who made a finding of facts. Defendant asks to have that judgment reversed, *first*, because the policy became void by reason of a transfer of the property from plaintiff to his wife; *second*, because a provision in the policy gave exclusive jurisdiction to the auditing committee of defendant's organization to determine the controversy. The finding of the trial court, so far as material to the controversy in this court, is as follows:

"That on the 17th day of October, 1899, the said defendant issued a policy of insurance to the said plaintiff in the sum of $2,079 upon the following described property, and in the several amounts stated: Dwelling house number one, and accompanying outbuildings, $600; * * * personal property, $825. * * *

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"'In case of disagreement with the loser of property insured as to the amount of valuation, in whole or in part, said matter in difference shall be determined by said auditing and arbitration committee, and, in case of such disagreement, said board shall notify such loser of property, and give him an opportunity to appear before such board within 20 days thereafter, and present such evidence as he may to establish the justness or validity of such claim; and such board shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be final and binding upon such claimant and said company, and no suit in law or equity shall be commenced or maintained by any such loser or beneficiary to fix such amount or valuation. * * *

"'In case of any increase of risk to property insured in this company, or any change of the title or ownership of insured property, * * * the policy shall be null and void.' * * *

"October 30, 1899, the plaintiff was indebted as accommodation indorser upon some notes which were then, and had been for some little time, a source of annoyance to him. He advised with Mr. Fitz Gerald, an attorney at law and a member of this bar, and a gentleman friend and neighbor by the name of Kipp, and, acting under their advice, he did, on the 30th day of October, 1899, execute a warranty deed running to his wife, covering the lands upon which the buildings described in said policy of insurance were situated. Said deed was, by its terms, made subject to two mortgages, aggregating $4,000. Upon the same day of its execution he left it for record with the register of deeds of said county, where it remained until after the commencement of this suit, when it was delivered back to him, and he delivered it to his attorney in this case. His wife knew of the plaintiff's indebtedness, and that his creditors were threatening to enforce the same. The plaintiff, before executing the deed, told her that he had taken counsel, and had been advised to transfer the title to her to keep it away from his creditors, but he didn't know what he would do; and, within a few days after making and recording the deed, he told her that he had done so, and, when so told by her husband, she made no objection to it, nor did she express an acceptance of it. There was no consideration passed from the wife to the husband for the deed, no change in the occupancy of the premises, and the plaintiff continued in full control of the premises described in the deed, selling the products, appropriating the money to his own use, paying the taxes, and exercising the identical and same control in every respect as before

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the deed was made. His sole purpose in making said deed was to frighten off the creditors that were annoying him by reason of this accommodation indorsement, and prevent their getting the property. The wife never had manual possession of the deed, and never saw it until she was upon the witness stand in this trial.

"On the 21st day of February, 1901, the house and contents were destroyed and damaged by fire,—the house entirely destroyed, some of the contents entirely destroyed, and some of them partially destroyed. * * *

"On the 18th day of May the said auditing and arbitration committee met, and rejected plaintiff's claim as to the real estate, and allowed it as to the personal property at the sum of $179.25, which amount was afterwards paid to the plaintiff by the defendant, and accepted by the plaintiff to apply upon his claim."

1. Did the plaintiff avoid the policy by transferring the property to his wife? According to the finding of facts, though the deed was recorded, it was never delivered, and plaintiff did not intend that the title should pass. Under these circumstances the title would not pass. *Stevens* v. *Castel*, 63 Mich. 111 (29 N. W. 828); *Davis* v. *Davis*, 92 Iowa, 147 (60 N. W. 507); *Weber* v. *Christen*, 121 Ill. 91 (11 N. E. 893, 2 Am. St. Rep. 68); *McGraw* v. *McGraw*, 79 Me. 257 (9 Atl. 846). Defendant's counsel, however, strenuously insist that the undisputed evidence required the trial court to find that plaintiff left the deed for record with intent to pass the title to his wife, and error is assigned because such finding was not made. As might be expected, the only witness who gave direct testimony respecting this intent is the plaintiff himself, and defendant insists that it was the duty of the court as a matter of law to find that this testimony proved such intent. It is true that plaintiff testified, when being examined by defendant's counsel, that the deed was made with the intent of conveying and transferring the property, and that, when he placed the deed on record, he understood that he had transferred the property to his wife, and that the title was then in her. Subsequently, while under the examination of his own counsel, however, plaintiff testi-

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fied that he did not intend to give his wife the place and release his claim to it; that his sole and only purpose was to make the record title appear out of his name, for the purpose of frightening off or warding off an unjust claim; that he handed the deed to the register of deeds to change the record, and that he did not understand the difference between the record title and the actual title. While this testimony would have warranted the finding that there was an intent to pass the title, it is equally clear that, considered with the other facts found,—viz., plaintiff's desire to deceive his creditors, and at the same time keep the property,—it justified the court in refusing to make that finding. We cannot say, therefore, that the court erred in refusing to make the finding requested by defendant.

2. Did the contract of insurance give defendant's arbitration committee exclusive jurisdiction to determine this controversy between the parties? If it did, under the authority of *Canfield* v. *Knights of Maccabees*, 87 Mich. 626 (49 N. W. 875, 13 L. R. A. 625, 24 Am. St. Rep. 186); *Hembeau* v. *Knights of Maccabees*, 101 Mich. 161 (59 N. W. 417, 49 L. R. A. 592, 45 Am. St. Rep. 400); *Fillmore* v. *Knights of Maccabees*, 103 Mich. 437 (61 N. W. 785); *Raymond* v. *Insurance Co.*, 114 Mich. 386 (72 N. W. 254); and *Russell* v. *Benefit Ass'n*, 116 Mich. 699 (75 N. W. 137),—it would afford a complete defense to this suit. But we are of the opinion that the agreement for this arbitration relates only to cases of "disagreement as to the amount of valuation, in whole or in part," and therefore is inapplicable to this controversy, in which the disagreement related to the validity of the claim.

The judgment of the court below must therefore be affirmed, with costs.

The other Justices concurred.

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WILLIAMS *v.* DAVISON'S ESTATE.

1. GUARDIAN AND WARD—GIFTS—VALIDITY.
   An instrument executed by a minor ward, purporting, in consideration of love and affection, and of the care and attention bestowed on her by her guardian, to convey to the latter an interest in the ward's share of the estate of her deceased father, then in the hands of trustees, is unenforceable.

2. SAME.
   So, too, is a like instrument, executed by a ward, in response to the importunities of the guardian, soon after arriving at majority, and before the settlement of the guardian's accounts.

Appeal from Wayne; Carpenter, J. Submitted April 8, 1903. (Docket No. 7.) Decided May 29, 1903.

Petition by Elvira Vail Williams to enforce an assignment of an interest in the estate of Crosier Davison, deceased. From an order denying the petition, petitioner appeals. Affirmed.

Fred H. Aldrich, for petitioner.

Fred C. Harvey, for defendant.

MONTGOMERY, J. The will of Crosier Davison bequeathed to his executors, as trustees, a residuum of his estate, with directions to receive the rents, profits, and accumulations until the youngest of two daughters should attain the age of 25 years, paying them, from such rents, profits, and accumulations, certain annuities, and directing a division of this residue equally between the two daughters when the youngest should reach the age of 25 years. The petitioner, Elvira Vail Williams, then a maiden lady, and a sister of the testator's wife, was by a codicil of the will allowed $5 per week from the estate so long as she remained with testator's daughters; and at the

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same time a provision was made for her by the execution of deeds of realty, to be delivered at the testator's decease, and which were in fact delivered, from which an income of about $70 per month was derived. The petitioner was also appointed guardian of the two daughters, Hattie M. and Carrie M.

On the 21st of May, 1894, each of the daughters executed an instrument reciting that in consideration of the constant and faithful care and attention bestowed by petitioner, and in consideration of her care and attention bestowed upon the father and mother in their last illness, and in consideration of love and affection felt because of her motherly demeanor and attention, it purported to assign, convey, and set over to said Elvira Vail Williams the sum of $5,000 of her interest in the estate of her deceased father, and purported to authorize the executor to pay the same to petitioner. The two instruments were alike in form, and were executed at a time when Hattie M. was still under age and under the guardianship of the petitioner, and but a few months after Carrie M. had arrived at her majority. This petitioner asks that she be paid the amount named in these two several assignments. On the hearing of the case at the circuit, the application of the petitioner was denied, and she appeals to this court.

As to the case of Hattie M., there can be no doubt as to the correctness of the conclusion reached. She was at the time of the execution of this paper under age, and under the guardianship of petitioner. No new consideration moved to her. The evidence indicates that the paper was, in effect, an attempted gift, and the rule which prohibits guardians from profiting out of the estate of the ward applies with full force.

As to the validity of the assignment of Carrie M., the case is almost equally as clear. At the time the assignment was made, she was just past 21 years of age. The guardian's account had not yet been settled. The evidence clearly indicates that, without any exact knowledge

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as to the amount of the estate which was coming to her, and because of importunities, not only of petitioner, but of the trustees of the estate, and as a means of satisfying the petitioner that she would care for her out of the estate, and, as Carrie M. testifies, to avoid trouble, she executed this agreement. The rule is elementary that, even after the ward attains majority and the guardian's accounts have been settled, while the disability of infancy has been removed, that arising from the trust relation is but slightly diminished, and contracts between the guardian and ward are scrutinized with the utmost care and caution, and, if the guardian derives a benefit or the ward suffers a loss by the transaction, it will not be sustained if the court is convinced that there is lacking the element of the utmost fairness and good faith. 15 Am. & Eng. Enc. Law (2d Ed.), p. 86. We think, within this rule, this attempted gift should not be sustained. While in no way intending to reflect upon the character or good faith of either the executor or the petitioner in this case, we think neither duly recognized the obligations resting upon them arising out of the trust relation, which in the one case still existed, and in the other had but shortly terminated, and that it is against equity to permit this attempted gift to be perfected.

The decree of the court below will be affirmed.

HOOKER, C. J., and GRANT, J., concurred. MOORE and CARPENTER, JJ., did not sit.

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SLATER v. UNITED STATES HEALTH & ACCIDENT INSURANCE CO.

1. CORRESPONDENCE—CONSTRUCTION.
   The construction of written correspondence between the parties to a suit is for the court.

2. BENEFIT SOCIETIES—SETTLEMENT OF CLAIM—RESCISSION—WAIVER OF RETURN OF CONSIDERATION.
   A member of a beneficiary association made a claim for sick benefits, and an agent of the association took up the certificate, and paid the member a certain sum in settlement of all claims by reason of the illness. The member never returned such amount, but subsequently sued for further benefits on the ground that the adjustment was made by reason of false and fraudulent statements to the effect that defendant had the right to take up the certificate. It appeared that, after the settlement, the association wrote plaintiff that the certificate was taken up by mistake, and the same was reissued, and premiums accepted. *Held*, that such conduct on the part of the company did not amount to a waiver of its right to insist on a return of the amount paid as a condition precedent to the rescission of the settlement by plaintiff.

Error to Washtenaw; Kinne, J. Submitted April 9, 1903. (Docket No. 21.) Decided May 29, 1903.

Assumpsit by John B. Slater against the United States Health & Accident Insurance Company of Saginaw on a policy of insurance. From a judgment for plaintiff, defendant brings error. Reversed.

Cavanaugh & Wedemeyer and *Arthur Brown*, for appellant.

Frank E. Jones and *Carl T. Storm*, for appellee.

CARPENTER, J. This suit is brought to recover a stipulated indemnity upon an insurance policy. The policy was issued by the United States Benevolent Society, March

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30, 1893. Defendant assumed its obligations January 29, 1901. By the provisions of this policy plaintiff was entitled to $7 per week during the time he might be ill, not to exceed 26 weeks, and his heirs were entitled to $75 as a burial fund in the event of his death. Plaintiff's testimony proved that he became ill June 28, 1901; that on July 20, 1901, he adjusted his claim against defendant for that illness for the sum of $45, and received a check for that amount; that he was induced to make this adjustment by the false and fraudulent statements of defendant's agent that defendant had a right to take up his policy of insurance; and that said policy was taken up at the time of the adjustment. When said settlement was made, plaintiff signed a receipt, describing his illness, and containing the following language:

"I hereby agree to accept the sum of $45 in full and complete settlement, compromise, satisfaction, discharge, and release of any and all claims, either of indemnity or otherwise, that I may have or hold against the United States Health & Accident Insurance Company under policy No. 7,129, or any other policy or policies which I now hold, issued by said company, by reason of the aforesaid illness, or by reason of any disability the cause of which originated prior to this date."

Said plaintiff's illness continued for a period of 26 weeks. He brought this suit without returning or tendering the money received by him when said adjustment was made. It is conceded that, under the decisions of this court (see *Pangborn* v. *Insurance Co.*, 67 Mich. 683 [35 N. W. 814]), this he could not do, unless defendant had waived said tender. This question of waiver was submitted to the jury, who found for the plaintiff, and the only question raised in this court is whether or not there was any evidence which justified their finding.

Plaintiff claims this waiver is proved by the following testimony: While the policy was in the possession of the defendant, it attached thereto a rider, purporting to be dated January 29, 1901, by which it agreed "to and with

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the holder of said policy or certificate to assume the obligations of said policy or certificate." August 20, 1901, defendant wrote plaintiff's attorney as follows:

"I am in receipt of your letter regarding the cancellation of John B. Slater policy, and have looked it up carefully, and find he has one of the old policies, that does not have the clause for cancellation inserted. Mr. Forsythe, the adjuster, was ignorant of the same, and had no doubt his policy was one that could be canceled. * * * But Mr. Slater lapsed out of the society August 1st, and we would not care to reinstate him anyway. Of course, it would be optional with us whether we reinstated him or not, and I think we have paid him about enough money now, for one member."

August 28th it wrote:

"We would just as soon he kept his policy up. It does not make any material difference. So you may mail $2 here for August and September dues, and we will mail you policy with receipt for those two months."

And August 31, 1901, it wrote:

"We are in receipt of your letter, with check for $2 for John B. Slater for August and September dues, and you will find inclosed herewith receipt and policy."

And this constitutes all the evidence which it is claimed has any tendency to prove that defendant ever waived its right to have the money returned. No claim is made that the rider attached to the policy, and dated January 29, 1901, in any way changed the obligations of defendant. That simply attached to the policy formal evidence of defendant's existing obligation. It is for the court, and not the jury, to construe the correspondence. We are unable to find in it any evidence of intent to waive the return of the $45, or to set aside the settlement theretofore made. It seems to have been the opinion of the trial court and of plaintiff's counsel that, because the settlement and the surrender of the policy were parts of one transaction, defendant's voluntary assent to set aside the surrender also set aside the settlement. We cannot accept this

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reasoning. Though the settlement and surrender were parts of one transaction, the parties could, by their agreement, separate them; and it is obvious from this correspondence that, though the defendant intended to set aside the surrender of the policy and reinstate the same, it did not intend to set aside that part of the agreement by which it adjusted its obligation to indemnify plaintiff for his then illness. In our judgment, therefore, there was no evidence from which the jury could find that defendant waived the return of the $45.

The judgment of the court below will therefore be reversed, and a new trial granted.

The other Justices concurred.

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WILSON *v.* WOOLMAN.

DRAINS—CONSTRUCTION—VALIDITY OF PROCEEDINGS—ASSESSMENT—INJUNCTION—ESTOPPEL.

A landowner who, knowing that a drain is being constructed, for which he is liable to assessment, takes none of the statutory steps to determine the validity of the proceedings, cannot thereafter maintain a bill to restrain the collection of the tax on the ground that the proceedings are invalid.

Appeal from Sanilac; Beach, J. Submitted April 9, 1903. (Docket No. 20.) Decided May 29, 1903.

Bill by Charles Wilson against Hugh Woolman, drain commissioner of Sanilac county, and John Baird, treasurer of Marion township, to restrain the collection of a drain tax. From a decree dismissing the bill, complainant appeals. Affirmed.

Counsel for the defendants in their brief give a succinct statement of facts, which we adopt.

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In 1892, the Indian Creek drain was established and constructed in the township of Marion, Sanilac county, following Indian Creek, a natural water-course. This drain runs through complainant's lands described in the bill. It was established and constructed before complainant owned said lands. In many places this drain became filled up with sediment and refuse, and in June, 1900, the defendant Hugh Woolman, county drain commissioner, received an application to clean out and extend said drain down stream from its outlet about 100 rods. Acting in pursuance of said application, the drain commissioner caused a survey of said drain and the proposed extension thereof to be made, and thereafter ordered said Indian Creek drain to be cleaned out and extended from its outlet down stream 26.60 chains. He then procured releases of the right of way for said drain through all lands through which said extension would pass. In making the survey stakes were set 8 rods apart up stream, commencing with stake 0 at the outlet of the extension. Stake 13 of the new survey was placed 2 rods and 8 feet above stake 0 of the original drain, and the survey stakes on up stream held the same relative positions. In taking the levels along the old drain, the surveyor set the grade stakes on top of the earth excavated from the original drain. The surveyor made a new profile, showing the dimensions of the extension and the cleaning out throughout the whole length of said drain. In taking the levels for cleaning out said drain, the surveyor did not attempt to follow the dimensions of the old proceeding, except the width of bottom.

After procuring releases of all the right of way on the extension, the drain commissioner fixed the 25th day of September, 1900, as a day for letting of contracts, and served a notice of said letting of contracts upon complainant personally. Complainant attended at the letting of contracts, but was late in arriving there. Complainant was living on the lands described in his bill of complaint, and saw the men digging across his place at different times during perhaps a month or six weeks in the fall of 1900,

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and made no complaint against the proceedings until he was asked to pay the tax by the defendant John Baird, township treasurer. Complainant filed this bill on the 26th day of February, 1901, to restrain the collection of the tax. All drain taxes assessed for the construction of this drain were paid to the township treasurer except complainant's. Proofs were taken in open court, and the bill dismissed.

E. C. Babcock, for complainant.

Fred A. Farr, Prosecuting Attorney, and *W. H. Burgess*, for defendants.

GRANT, J. (*after stating the facts*). It is unnecessary to discuss the defects upon which complainant relies to defeat the payment of his taxes. The decree is right for two reasons: (1) Because the complainant knew of the proceedings as they were going on, and took none of the steps provided by statute for a speedy determination of the question of their validity. *Auditor General* v. *Melze*, 124 Mich. 285 (82 N. W. 886). (2) Complainant cannot be heard in a court of equity after the drain has been completed. He cannot stand by, see the work go on to completion, and then file a bill in equity to test the validity of the proceedings. *Township of Walker* v. *Thomas*, 123 Mich. 290 (82 N. W. 48).

The decree is affirmed, with costs.

The other Justices concurred.

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TOWNSHIP OF OVID *v.* HAIRE.

1. JUSTICES OF THE PEACE—JURISDICTION—WAIVER—APPEAL—GENERAL ISSUE.

   By pleading the general issue in the circuit court on an appeal from a justice of the peace, defendant waives any objections to the jurisdiction of the justice because of defects in the process or irregularities in adjournments.

2. SAME—DECLARATION—AMENDMENT.

   By such plea defendant also admits that there was a declaration, so as to justify the court in permitting plaintiff to amend the same.

3. SAME.

   Where a justice's return on appeal stated merely that "plaintiff declared verbally," without reciting the substance of the declaration, but accompanying such return was a statement by the county treasurer of uncollected personal taxes, among which was a charge against defendant, and a plea of the general issue was interposed, plaintiff was properly permitted to amend the declaration by setting up a claim to recover such taxes.

4. PERSONAL TAXES—SUIT TO COLLECT—AUTHORITY OF TREASURER.

   A township treasurer may bring suit in the name of his township to recover a tax on personal property, when authorized so to do by the supervisor.

5. SAME—EVIDENCE.

   The testimony of the treasurer that he was so authorized is competent to establish that fact.

6. SAME—DOMICILE—QUESTION FOR JURY.

   Evidence in an action to collect a personal tax *held* sufficient to authorize the submission to the jury of the question of defendant's residence in the plaintiff township.

Error to Clinton; Stone, J. Submitted April 9, 1903. (Docket No. 13.) Decided May 29, 1903.

Assumpsit by the township of Ovid against James

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Haire for taxes on personal property. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff sued defendant in justice's court to recover the amount of taxes assessed against him upon personal property. Summons was duly served, and defendant appeared specially, and objected to the jurisdiction of the court upon the ground that the summons issued was not such a summons as the law required to be served upon a nonresident; defendant claiming to be a nonresident. The objection was overruled, and the case was twice adjourned. Defendant took no further part in the trial before the justice, and judgment was finally rendered against him. He took a special as well as a general appeal to the circuit court. The court overruled the special appeal, and thereupon he pleaded the general issue. Upon the trial defendant seasonably objected to any evidence under the pleadings upon the ground that the declaration did not set forth any cause of action. Thereupon plaintiff was permitted to amend its declaration, and at the same time filed a bill of particulars, showing plaintiff's claim to be $120.86, taxes assessed against the defendant upon personal property for the year 1900. The case proceeded to trial, resulting in a verdict for the plaintiff.

A. G. Shepard, for appellant.

Fred R. Everett (*John C. Dooling*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). The objections made to the jurisdiction of the justice's court were waived by the plea of the general issue.

The return of the justice did not state the substance of the declaration; it simply states that the plaintiff declared verbally. Among the papers returned by the justice was a statement by the county treasurer of uncollected personal taxes, on which was the amount assessed against the defendant. This paper showed the claim against the

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defendant. Defendant relies upon those authorities holding that an amendment cannot be allowed in the circuit court which states a different cause of action than that stated in the justice's court; citing, among other authorities, *Loranger* v. *Davidson*, 110 Mich. 605 (68 N. W. 426), and *Moore* v. *Hansen*, 75 Mich. 564 (42 N. W. 981). If defendant had interposed no plea, his objection might be good under *Moore* v. *Hansen*. If there was no declaration, there was nothing for the defendant to plead to. He evidently understood that there was a declaration, which was undoubtedly true, for the justice returned that there was one, but did not state its substance. The defendant, by his plea of the general issue, admitted that there was a declaration. This being so, the liberal rules of amendment apply. We think there was no error in permitting the amendment.

The treasurer testified that the chairman of the town board, who was the supervisor, authorized him to bring the suit. This testimony was competent to establish such authorization. When so authorized, the treasurer may bring such suit. *Township of Bangor* v. *Transportation Co.*, 112 Mich. 601 (71 N. W. 143).

The meritorious question in the case is that of defendant's residence. He was formerly a farmer, living in the township. He was a bachelor, but kept house, his sister being his housekeeper. He testified that on the 15th day of March, 1899, he made an auction, and sold his personal property, live stock, tools, etc., also his household goods that were salable; that he had rented his farm, but reserved one room for his sister's household goods and some of his own things; that when he left Ovid he intended to make Detroit his home; that he had been back to Ovid several times, but only on account of business; that when he left Ovid he had no intention of making that his home again; that, after living in Detroit a while, he moved to Windsor, Canada. He kept house in neither place. He testified that there might be a little hay belonging to him upon the farm. We think his residence was, under the

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circumstances, a proper question for the jury. The court gave very explicit and fair instructions upon this point, telling them that, if the defendant actually moved away, and was an inhabitant of some other place, and resided elsewhere, that would be conclusive in his favor.

We find it unnecessary to discuss any of the other questions raised.

Judgment affirmed.

The other Justices concurred.

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PRATT *v.* WICKHAM.

1. EXCHANGE OF PROPERTY—PASSING OF TITLE.
   Title to the property of one of the parties to a contract of exchange may pass before he has acquired title to that for which it is exchanged.

2. SAME—QUESTION FOR JURY.
   Where defendant agreed to exchange a bull owned by him for a buggy owned by plaintiff and a harness which plaintiff was to procure, and it was agreed that the buggy should be repaired and painted by plaintiff, and, with the harness, left at a certain village, where defendant was to obtain them, and, on the day of the agreement, plaintiff changed the bull to a stag, and was to get it as soon as it should recover, a finding that the title to the bull passed to plaintiff on the day of the agreement was justified.

3. WITNESSES—CREDIBILITY—CROSS-EXAMINATION.
   In replevin, it was not error to permit defendant, on cross-examination, to be asked whether he had not pleaded guilty to stealing a grindstone from another, for the purpose of affecting his credibility.

4. EXCHANGE OF PROPERTY—PASSING OF TITLE—INSTRUCTIONS.
   In replevin for a bull which plaintiff was to receive on an exchange of property with defendant, the court, having charged that if it was the intention of the parties, at the date of the agreement, that title should pass to plaintiff, then

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plaintiff was entitled to recover, but that, if such was not their intention, the verdict should be for defendant, further instructed that if the bull was turned over to plaintiff, who then and there changed him from a bull to a stag, that would be "strong evidence" of a change of title, and, if there was a change of title, plaintiff was entitled to recover. *Held*, that the latter instruction implied that the turning over to plaintiff was with intent to pass title, and, so construed, was not erroneous.

Error to Leelanaw; Mayne, J. Submitted April 9, 1903. (Docket No. 14.) Decided May 29, 1903.

Replevin by William H. Pratt against Willard H. Wickham. From a judgment for plaintiff, defendant brings error. Affirmed.

W. H. Foster, for appellant.

Archie F. Bunting, for appellee.

CARPENTER, J. Plaintiff commenced this suit in replevin in justice's court for a stag valued at $30. He prevailed in that court and in the circuit court, to which defendant appealed. The testimony of the plaintiff tended to prove that June 12, 1901, at defendant's farm, he and defendant agreed upon an exchange of property. The defendant agreed to exchange a bull owned by him for a buggy owned by plaintiff and a harness which plaintiff was to procure. The buggy was to be repaired and painted by plaintiff, and the harness was to be secondhand, and worth $6. The buggy and harness were to be left in the village of Empire, Leelanaw county, where defendant was to obtain them. At the time the contract of exchange was made, plaintiff changed the bull to a stag, and it was arranged that he should come and get the animal as soon as he was better. The plaintiff repaired the buggy, bought the harness, and left them in the village of Empire, as agreed. He notified the defendant of his action, and demanded the stag, and, on defendant's refusal to comply with his demand, brought this suit.

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Defendant contended in the court below, and does here, that, under plaintiff's testimony, the court should have instructed the jury to render a verdict for the defendant, on the ground that the title to the stag did not pass to the plaintiff. Defendant argues that the title to the stag did not pass because the title to the buggy and harness to be transferred in exchange did not pass. Conceding that the title to the buggy and harness never passed to defendant, it by no means follows that the title to the stag did not pass to the plaintiff. It is well settled that, in case of a sale, title may pass though the purchase price is not paid. See 1 Mechem, Sales, §§ 493–495. So, in case of exchange, title to the property of one of the contracting parties may pass before he acquires title to the property for which it is exchanged. *Mitchell* v. *Gile*, 12 N. H. 390. The testimony in this suit warranted the jury in finding that plaintiff acquired title to the stag June 12, 1901.

When the defendant was being cross-examined by plaintiff's counsel, the following occurred:

"*Q.* Did you ever plead guilty * * * of stealing the Empire Lumber Company's grindstone? (Objected to as immaterial. Overruled. Exception.)

"*A.* Yes, sir."

Defendant's counsel seriously contends that this ruling was erroneous. The testimony was clearly admissible for the purpose of affecting the credibility of defendant. *Clemens* v. *Conrad*, 19 Mich. 170; *Wilbur* v. *Flood*, 16 Mich. 40 (93 Am. Dec. 203); *Dickinson* v. *Dustin*, 21 Mich., at page 565.

In his charge to the jury, the court said:

"And in order that the title to this animal should pass from the defendant to the plaintiff, it is necessary for you to find that the parties so intended on the 12th day of June. If the parties at that time intended that from that time the bull was to be the property of the plaintiff, then the plaintiff is entitled to recover in this action. If, on the other hand, they did not, and the minds of the parties did not meet, and it was not the intention of the parties

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that the title should pass and that the plaintiff should have possession of the bull after that time, then your verdict should be for the defendant, of no cause of action. If you should find that the bull was turned over by the defendant to the plaintiff, that the plaintiff then and there went on and changed him from a bull to a stag, that would be strong evidence of the fact that the minds of the parties had met at that time, and that there was a change of title; and, if there was a change of title, then the plaintiff must recover in this cause."

Complaint is made of the last sentence, upon the ground that the court should not have instructed the jury what constituted strong evidence. In the connection in which this language was used, defendant's rights were in no manner prejudiced. It would have been proper for the court to charge the jury that, if the defendant turned the bull over to the plaintiff with the intent to pass the title, the title did pass; and we think, in the language complained of, it is implied that the turning over by defendant to plaintiff was with intent to pass the title.

The judgment of the court below should be affirmed.

The other Justices concurred.

SANDERSON v. ADAMS.

DEEDS—INCAPACITY OF GRANTOR—AFFIRMANCE.

Where complainant, when about to be arrested for the murder of her husband, made an improvident conveyance of her interest in his estate to defendants, and thereafter, when out on bail, and with knowledge of all the circumstances, accepted the amount agreed to be paid her, less a liberal discount for anticipating the time of payment, she thereby affirmed the previous agreement, and could not maintain a bill to set aside the conveyance.

Appeal from Calhoun; Winsor, J. Submitted April 21, 1903. (Docket No. 33.) Decided May 29, 1903.

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Bill by Mary Sanderson against Jasper Adams, Ella Adams, Gavin Ritchie, Jr., Edward Stringham, George Stringham, and Lucius Sanderson to set aside certain conveyances. From a decree dismissing the bill as to all defendants except Ritchie, complainant appeals. Affirmed.

Stewart, Sabin & Hooper, for complainant.

Mechem & Bailey and *O. S. Clark*, for defendants.

CARPENTER, J. Complainant brought this suit to procure a decree setting aside certain conveyances executed by her conveying her interest in the estate of her deceased husband, Rudolphus Sanderson. One of these conveyances was dated October 15, 1898, and ran to Gavin Ritchie, Jr. The other was dated October 22, 1898, and ran to defendants George and Edward Stringham. The court below refused to set aside the conveyances, but rendered a personal decree against defendant Ritchie, compelling him to repay complainant $400 obtained by him. Complainant appeals to this court, asking the relief which was denied her in the court below.

The material facts established in this case are as follows: Rudolphus Sanderson, complainant's husband, died September 6, 1898. He left no will. He had no children. One half of his estate was inherited by his brothers and the daughters of a deceased sister. The other half was inherited by complainant. Soon after the death of her husband, complainant learned that defendant Jasper Adams, who was the brother of her husband's first wife, suspected her of murdering her husband, and that a criminal prosecution charging her with such murder was likely to be instituted. October 15, 1898, complainant was induced by the fraud of Gavin Ritchie, Jr., to make the first conveyance heretofore mentioned. Complainant received from Ritchie $100, and immediately went to Chicago, Ill. Shortly thereafter said criminal proceedings were instituted. Complainant thereupon returned, and consulted her lawyer in Marshall. On the 22d of

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October, 1898, acting under the advice of this lawyer, complainant made a second transfer of said property to the defendants Stringham. Defendant Ritchie at the same time, at complainant's request, transferred all his interest to the Stringhams. Complainant received from the Stringhams $1,500 in cash ($600 of which she was compelled to and did pay to defendant Ritchie), and an agreement to pay the sum of $5,000 out of the first moneys received from the estate when it was settled, provided that, if the part of the indebtedness of the estate chargeable against complainant's share should exceed $250, the excess should be deducted from the $5,000 deferred payment. This agreement was made in the office of complainant's attorney. Complainant was not at that time actually in custody, but an officer was in fact and to her knowledge waiting to take her in custody as soon as this arrangement was made. October 26, 1898, the defendants Stringham transferred their interest in the property to defendant Jasper Adams and his brother Onyx, since deceased. The Adamses paid the Stringhams $9,000 for the one-half interest in the estate acquired by them. As a part of this consideration, they assumed the obligation of the Stringhams to complainant. On the 5th of August, 1899, while the complainant was at liberty, but on bail, she received from the Adamses the sum of $4,000 in full for the balance remaining due on the contract of sale, and executed a full release of her claims. If this settlement had not been made, complainant would have been shortly thereafter entitled, under the terms of her contract, to about $4,600 (the $5,000 being reduced by the fact that the claims against complainant's share of the estate were about $400 in excess of the $250 stipulated). While the value of the interest of complainant in her deceased husband's estase is somewhat uncertain, we think it may be assumed that it proved to be worth about $11,000.

We agree with the trial judge that there was no conspiracy between the defendant Ritchie, the Stringhams, and the Adamses. The testimony establishes to our satis-

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faction that they did not act in concert. The defendants Adams were not interested in any way in the project of Ritchie to acquire this property, nor in the purchase by defendants Stringham from complainant. We agree, too, with the trial judge that defendants Stringham did not practice any fraud upon complainant when they obtained the conveyance of October 22, 1898. We find it unnecessary, however, to determine whether the circumstances surrounding complainant—the fact that she was practically in custody, and was terrorized by the situation—destroyed her capacity to act. If it be assumed that her capacity was impaired to such an extent that she had a right to disaffirm the contract, she lost that right August 5, 1899, by receiving and appropriating its proceeds. On August 5, 1899, complainant was not in custody; she knew that the bargain of October 22, 1898, was an unwise one; she also knew the fact—if fact it was—that that bargain was made when her state of mind deprived her of the capacity to make it; and at this time, we agree with the trial judge, she possessed full capacity to act. If she had a right at this time to disaffirm the contract, she had a right to affirm it, and when she accepted and appropriated its proceeds she made an election which for all time affirmed it. *Bedier* v. *Reaume*, 95 Mich. 518 (55 N. W. 366); *Carroll* v. *Rice*, Walk. Ch. 373; *Merrill* v. *Wilson*, 66 Mich. 232 (33 N. W. 716); *Cobb* v. *Hatfield*, 46 N. Y. 533.

Complainant's counsel indulge in harsh criticism of defendant Adams because in the settlement of August, 1899, he exacted from complainant about $600 as a consideration for his anticipating the time of payment of the balance due her. Whether or not this was an exorbitant charge for the accommodation would depend upon many circumstances, and is a question immaterial to this decision, as in no event would it furnish a reason for setting aside the conveyance theretofore made.

The trial judge did, however, err in determining the amount to be repaid by defendant Ritchie. Ritchie re-

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ceived $500, and not $400, as the trial judge determined, to which he had no right.

It results from these views that the decree of the court below should be so modified as to compel defendant Ritchie to pay complainant the sum of $500, instead of $400, with interest at 5 per cent. from October 22, 1898; and in all other respects it should be affirmed, with costs to the defendants Adams and Stringham.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. HOOKER, C. J., did not sit.

HAYMAN v. WAKEHAM.

1. DEEDS—MENTAL CAPACITY.
   One has sufficient mental capacity to execute a valid deed if competent to understand the business in which he is engaged, to know the extent and value of his property, and how he wants to dispose of it, and to keep such facts in his mind long enough to plan and effect the conveyance without prompting or interference from others.

2. SAME—UNNATURAL CONVEYANCE—BURDEN OF PROOF.
   In a suit to set aside a deed whereby the grantor, when 72 years of age, and in poor health, conveyed his property to his second wife, whom he had just married, to the exclusion of his children, the circumstances do not operate to shift the burden of proof as to mental capacity upon the defendant.

Appeal from St. Clair; Law, J. Submitted April 23, 1903. (Docket No 47.) Decided May 29, 1903.

Bill by Jennie Hayman and others against Harriet G. Wakeham to set aside certain deeds. From a decree dismissing the bill, complainants appeal. Affirmed.

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George G. Moore (*Atkinson & Atkinson*, of counsel), for complainants.

Lincoln Avery (*Avery & Walsh*, of counsel), for defendant.

MONTGOMERY, J. This case presents a question of fact. We have had the benefit of elaborate briefs and full oral argument. A statement of the case and the conclusions of the circuit judge are taken from the opinion of the circuit judge:

"The complainants in this cause are the daughters and sons and heirs at law of Richard Wakeham, deceased. The defendant is the second wife of the said Richard Wakeham, deceased, and the stepmother of complainants. Defendant married said Richard Wakeham in 1897. After the said marriage Richard Wakeham went to the defendant's home, where he lived with his said wife until his death, which occurred on October 30, 1900.

"On January 27, 1898, and about three months after the said marriage, Richard Wakeham and the defendant, his wife, joined in a deed of certain real estate owned by him to one John E. Knapp, and the said Knapp on the same day made a deed to Richard Wakeham and the defendant, his wife, thus creating an entirety of interest in said real estate in the husband and wife. Another deed was afterwards made by Richard Wakeham direct to the defendant, conveying a part of the property described in the first deed. This bill is filed to set aside these deeds on the following grounds: *First*, that, at the time said deeds were made, the said Richard Wakeham was mentally incompetent; *second*, that undue influence was exerted over the said Richard Wakeham by the defendant, whereby he was induced to make said conveyances.

"The evidence shows that Richard Wakeham was very sick in the fall and winter of 1896 and in the winter and spring of 1897. He was a man about 72 years of age at the time of his said marriage, and it is quite certain that he was never physically strong after such sickness up to the time of his death, and undoubtedly not as strong mentally after the time of said sickness as he had been in former years. The evidence of undue influence in said case is remote and inferential, and hardly rises to the dignity of legal proof.

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"The rule to be applied in this case, in reference to the mental competency of Richard Wakeham, has been declared many times in our courts, and is whether, at the time he executed the deeds in question, he had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others. Can any court say, under the testimony and facts of this case, that he did not have such mental capacity as above described? I think not.

"It is argued that the daughters and sons of Richard Wakeham were the natural objects of his bounty, and the fact that the property in question was conveyed by him to the defendant is in itself such an indication of mental incapacity as operates to shift the burden of evidence on the question of mental capacity to defendant, and this legally requires her to affirmatively show that Richard Wakeham had the required mental capacity at the time of the execution of the instruments in question. The Supreme Court of this State has uniformly held the contrary doctrine. While it may be said that his blood relations were the natural objects of his bounty, his bounty is not limited by blood relationship, nor have his blood relations any natural or inherent right to his property. He may dispose of his property as he pleases, and it is not an indication of mental incapacity that he gave the defendant, his wife, the property in question, thus excluding his sons and daughters from sharing in that part of his estate.

"It appears by affirmative evidence in this case that, at the time he executed the first conveyance in question, he was not weak enough to be a mere instrument in any one's hands. There can be no fatally undue influence without a person incapable of protecting himself, as well as a wrong-doer to be resisted. There is no evidence that either existed in this case.

"As to Michigan authorities upon the questions I have discussed I cite *Latham* v. *Udell*, 38 Mich. 238; *Pierce* v. *Pierce*, Id. 412; *Spencer* v. *Terry's Estate*, 127 Mich. 420 (86 N. W. 998)."

A careful examination of the record convinces us that this opinion fairly states the facts and the law of the case, and the decree will be affirmed, with costs of this court.

The other Justices concurred.

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PEOPLE *v.* McDONALD.

1. BURGLARY—EVIDENCE—SUFFICIENCY.
   In a prosecution for burglary, evidence reviewed, and *held* sufficient to sustain a finding that respondent aided and abetted in the commission of the offense charged.

2. CRIMINAL LAW—EVIDENCE—PHOTOGRAPHS.
   Where respondent, after being arrested, on being interrogated by the chief of police, denied having been in the vicinity where the offense was committed, and claimed a certain city as his residence, and, when shown a picture in a paper called "The Detective," at first denied, but afterwards admitted, that the picture was of himself, the picture was admissible to prove the falsity of the statements made by him as to his identity.

3. SAME—BURGLARY—ARGUMENT OF PROSECUTOR.
   It was not error to permit the prosecuting attorney, in a prosecution for burglary, to urge before the jury, from the testimony, that respondent was a "bad man," and "as bright a man of his kind as was ever before a jury,"—particularly where respondent's counsel had argued that there was no evidence that respondent was a bad man.

4. SAME—CONDUCT OF ACCUSED.
   Nor was it error for the prosecutor, in commenting on respondent's attitude after his arrest, to state that his position was that he was not bound to answer questions concerning himself, and that the position of an innocent man, when charged with crime, would be entirely different, and that he would lose no time in doing everything possible to convince the officers that he was innocent.

5. SAME—EXTRANEOUS MATTERS—HARMLESS ERROR.
   In a prosecution for burglary, a picture of respondent, contained in a paper, which respondent at first denied but finally admitted was his, was introduced in evidence. Thereafter the prosecuting attorney, in referring to the picture in his argument, spoke of the contents of the paper. On objection the court ruled that it was improper to comment on any part of the paper except the photograph. *Held*, that, in view of the action of the trial judge, the error of the prosecutor in commenting on the paper was harmless.

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Error to Jackson; Peck, J. Submitted April 24, 1903. (Docket No. 174.) Decided May 29, 1903.

Don A. McDonald was convicted of burglary, and sentenced to imprisonment in the State prison at Jackson for seven years. Affirmed.

Elmer Kirkby, for appellant.

Forrest C. Badgley, Prosecuting Attorney, for the people.

MONTGOMERY, J. Respondent was convicted of the offense of breaking and entering an office not adjoining to or occupied with a dwelling house, in the night-time, and brings error. It was not claimed by the prosecution that the respondent was the one who actually broke into the office, but it was claimed that the respondent was present at the block of which this office was a part, aiding and abetting in the commission of the offense.

Three points are urged for the respondent: *First*, that there was not sufficient evidence to connect respondent with the offense; *second*, that error was committed in permitting the introduction of a certain picture shown to the respondent by the chief of police; and, *third*, that the prosecuting attorney committed error in his summing up to the jury.

As to the first point, we cannot do better than to adopt the language of the learned circuit judge in denying a motion for a new trial. The statement is fully supported by the record, and clearly deduces just inferences from the testimony. It is as follows:

"I do not care to speak of all the evidence that had a bearing upon that question, but there are some features of it that were so impressible to my mind then, and are now, that it is perhaps proper for me to refer to them in determining this motion. So far as the evidence shows, the defendant was a stranger in this city. This burglary was committed in an office building, where many people have offices. The defendant was about that building. So far

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as the evidence shows, nobody knew him. He was a stranger. He was seen many times during the day in and about that building. He was seen about upon the sidewalk in front of it, and at its front entrance, under such circumstances as would make him familiar with the building itself, and the habits, so far as he could learn them in a day, of the people doing business there. He bought cigars at the cigar-stand at the entrance in the morning. He visited this very office of the Metropolitan Insurance Company, and got a bill changed. He was about there at different hours of the day. About 7 o'clock in the evening this burglary was committed, and at a time when most of the occupants and people in the offices would naturally be away.

"Now, the evidence was that at the very time when the complaining witness, Schneider, was being bound, gagged, and tied to his chair, McDonald sat out on the rail, looking towards this door. That occurred almost instantly after Schneider went into this office. Now, there can't be much mistake about such a thing as that. I presume the jury agreed, as most any reasonable persons would, that, of all the human beings on earth, McDonald, and McDonald alone, was looking out for the men who actually committed the burglary, knew that it was being committed, had seen those men go in there, knew that they were there when Mr. Schneider came in, saw Mr. Schneider go in, and sat on the rail while he was being bound, gagged, and tied to the chair. That is the evidence in this case,—that he was looking right at the door.

"Now, there is more than that. He was on hand there whenever any of the occupants of the building showed up. Dr. Lathrop came up with Mr. Schneider in the elevator. McDonald was not visible to the naked eye at that moment, as he would not naturally be to Mr. Schneider when in this office, and Dr. Lathrop noticed McDonald was not going out of the building. Dr. Lathrop was in his office only a moment. He got up, and picked up a letter that he had neglected to mail, and came right out for the purpose of mailing it. Then McDonald was there. At that instant, under the testimony, Schneider was being gagged, and there was no human being about those corridors on that floor, except McDonald. He was making some effort to get into the water-closet,—a place which offered a convenient view of the entrance to the Metropolitan Life Insurance Company. He didn't want to get into

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the water-closet very bad, according to the testimony of Dr. Lathrop, because, as soon as the doctor called his attention to it, he says, 'The door is opened.' So the doctor hurriedly passed down, while McDonald maintained his point of observation around that corridor.

"Now, if we stop to think where a man could locate himself, what he would do, how he would act, where he would be, bear in mind that he must have known that Schneider had just gone into that office, for he was the only person who was about there, keeping watch, and must have known what was going on. Dr. Lathrop did not know, and passed down the elevator; but McDonald maintained his position.

"Now, it is not an unreasonable inference that a rational mind should draw the conclusion from all this evidence that McDonald knew what was being done, and was aiding and assisting in its being done. It could not have been done without McDonald's assistance,—without his aid. And it is not surprising that a jury should find from this evidence that McDonald was aiding, assisting, and encouraging the commission of this crime. And we must remember it was not the actual binding and gagging that McDonald was charged with; it was the aiding and assisting the actual perpetrators who bound and gagged Mr. Schneider, and had knocked the handle off the safe door. Mr. Schneider must have come on the scene just at the moment when the safe was being broken open, and something had to be done; and it is not possible that any man could sit on that rail, about 20 feet from that door, his eyes right on it, and not know anything about it."

The testimony as to the picture in question was as follows: Mr. Boyle, the chief of police, testified that, after the arrest of the respondent, he interrogated him as to his residence, etc., and that the respondent denied having been in the block in question, and claimed Detroit as his residence. Later Mr. Boyle showed him a picture in a paper called "The Detective," and asked him if that was not a picture of him (the respondent). Respondent at first denied it, but later said to the chief that he would admit that the picture was of himself. All this testimony was admitted without objection. Thereupon the picture

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itself was offered in evidence. We think it was admissible for the purpose of showing the falsity of statements made by the accused as to his identity.

The argument of the prosecuting attorney complained of was as follows:

"It is always a bad man that does that, and there isn't any question about it. So we would naturally expect in a case of this kind, before we could ask for a conviction at the hands of a jury, that you are dealing with a bad man. And I want to say to you, gentlemen, that I believe this man is as bright a man of his kind as was ever before any jury on earth.

"*Mr. Kirkby:* I want an exception to that remark. There isn't any evidence in the case concerning it.

"*The Court:* I suppose Mr. Badgley is simply stating that from the circumstances and conduct. In that respect, he is entitled to speak of it.

"*Mr. Badgley:* He tells you that he is not obligated, under the law, when he was asked as to where he lived, and all those questions, to say a word, and I admit it. But, gentlemen of the jury, when I am arrested, charged with the commission of a burglary that I have nothing to do with, and I know that I must face a jury of 12 men unless I can explain my whereabouts, if there is any way on God's green earth that I can satisfy the officers or anybody else that I am entirely innocent, I am going to lose no time in doing it; and so are you, and so is Mr. Kirkby, and so is every other man who is innocent.

"*Mr. Kirkby:* I take an exception to that.

"*Mr. Badgley:* You can take your exception.

"*The Court:* Go on.

"*Mr. Badgley:* And, gentlemen, after this man had told the chief where he lived, and what his business was, then he was shown his picture in this paper, which is known as 'The Detective,' and which the chief showed to him. 'Oh, no, Chief, that is not me,' he said. But, gentlemen, while this man had been telling the chief where he lived and what his business was, and before he had told him that, this little paper had come to Chief Boyle's hands, telling him who this man was and where he lived; and that paper told him that his name was not McDonald.

"*Mr. Kirkby:* I object to the prosecutor stating what that paper told him.

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"*The Court:* The paper itself is not in evidence. The front part and face of the photograph is all there is about it, and that is all it is proper to comment on."

It is said in the brief of the prosecuting attorney that in the argument for the respondent it was stated that there was no evidence that he was a bad man, and that the first portion of the argument above quoted was in reply to this statement. We think it was competent for the prosecutor to draw inferences from the testimony. We also think the comment made by the prosecutor upon the respondent's attitude after his arrest was fair argument. The comment as to the paper was more doubtful, as it was not in evidence; but it was promptly checked by the circuit judge before any harm could have been done to the respondent.

The conviction is affirmed.

The other Justices concurred.

BROWN *v.* PONTIAC, OXFORD & NORTHERN RAILROAD CO.

1. CARRIERS—INJURY TO SHIPPER—DELIVERY OF CAR—QUESTION FOR JURY.

   Where a shipper of live stock agreed with the company's agent at the point of destination that, on the arrival of the car, it should be placed at a cattle-chute to permit him to unload, and the car was so placed, and detached from the train by the brakeman, who told the shipper it was "all right," it was a question for the jury whether the shipper, who was injured by the backing of the train against the car while he was unloading it, had a right to assume that the car had been delivered to him.

2. SAME.

   Irrespective of such prior agreement, and though there was no showing of any formal action by the conductor, it was for the jury to say whether a delivery of the car was not intended;

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it appearing that there was no other place at which the stock could be unloaded.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company by a shipper for injuries received by the backing of a train against a car which he was unloading, where the testimony was conflicting as to whether he was in position to see the approaching train, the question of his contributory negligence was for the jury.

Error to Tuscola; Beach, J. Submitted April 24, 1903. (Docket No. 53.) Decided May 29, 1903.

Case by Frank Brown against the Pontiac, Oxford & Northern Railroad Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

D. S. McClure and *C. F. Gates*, for appellant.

John H. Patterson, for appellee.

MONTGOMERY, J. This is an action for negligent injury. The plaintiff received the injuries of which he complains while attempting to unload from a car on the defendant's side track at Kingston two head of cattle and one calf, which, with household goods of plaintiff, constituted the shipment in said car, which had on the day in question been shipped from Leonard to Kingston. While plaintiff was so engaged in unloading the car, the defendant's train backed up against it, was coupled to it, moved forward, and caused the injuries which plaintiff sustained. Plaintiff's testimony tended to show that, in the position in which he was at the time the train was backed against the car which he was unloading, it was impossible to extricate himself until the forward movement of the car threw him to the ground and caused the injuries complained of.

The circuit judge, at the conclusion of the plaintiff's case, directed a verdict for the defendant. We are therefore to consider the case as made by the plaintiff's testimony, placing the most favorable construction upon the

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same, as we are bound to do. It appears by this testimony, in addition to the circumstances of the injury itself, as above detailed, that on the day in question the plaintiff shipped this car load of household goods and live stock from Leonard to Kingston. During the day, and while the car was in transit, the plaintiff called upon the station agent at Kingston, and arranged with the agent that the company should place the car, on its arrival, at the point where the injury occurred; that, after the car was so placed, the plaintiff should unload the live stock, and the car should then be moved back farther south, so that he could remove from it the balance of the property. When the train reached Kingston it was backed up to the cattle-chute,—the place designated by the agent in the arrangement made in advance,—the brakeman observing from the opposite side of the car, and looking underneath it, that the door of the car was opposite the chute; and, replying to plaintiff's inquiry as to whether it was all right, that it was, he cut off the car, left it there, and pulled the train forward. It was after this had occurred that the plaintiff attempted to unload the car.

The circuit judge's direction proceeded upon the view that, as the control of the train was with the conductor, there had been no delivery of this car; that no one having authority had said to plaintiff, in substance or effect, "Here is the car; we deliver it to you." The fault in this view is that it takes no account whatever of the previous arrangement with the station agent. It was not so much a question of who had control of the train while in operation. The fact appeared to be that the car had been located at the point previously agreed upon between the plaintiff and the station agent having control of the business at that point, and we think it was a question for the jury as to whether the plaintiff, in view of this previous talk, had the right to assume that this car was so placed with the purpose of delivering it to him. If it were, it was certainly a delivery.

But, even apart from this previous arrangement, we

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think it would be a question for the jury as to whether the backing of this car down to the cattle-chute, locating it there, detaching the train from it, and leaving it in position, was not intended as a delivery, in view of the fact that the car contained live stock, which it must have been known to the conductor should be unloaded at this station, and could be unloaded at no other point than the cattle-chute. The inference would not be open that this car was so located at the initiative of the brakeman, who happened to be present at that part of the train, and who placed it. On the contrary, the fair inference would be that the master of the train had directed this to be done.

In the brief of defendant's counsel the claim is made that the plaintiff was guilty of contributory negligence; it being contended that, standing on the east side of the car, where plaintiff was located, the car could be seen coming from the north. But the plaintiff's testimony shows that from the point where he was standing on the gang-plank, and close up to the car door, an approaching car could not be seen. We think the question of plaintiff's contributory negligence was, at the most, a question for the jury.

Judgment will be reversed, and a new trial ordered.

The other Justices concurred.

STODDARD *v.* GALLAGHER.

LANDLORD AND TENANT — PERMITTING PREMISES TO BECOME VACANT—BREACH OF COVENANT—ESTOPPEL TO CLAIM.

In May, 1898, the owner of a summer hotel leased it for a term ending October 1, 1903. The lease stipulated that, if the premises should become vacant, the lessor might re-enter and relet, applying the rental on the lessee's obligation. It was the lessee's practice at the end of the summer season to fasten the doors and windows, and leave his furniture; the hotel

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remaining unoccupied until the 1st of the ensuing June. The installments of rent were payable January 1st of each year, and in December, 1900, the lessor requested payment for the ensuing season, which was made. In April, 1901, the lessor sold the premises; the purchaser assuming the risk and expense of getting possession. Negotiations for a surrender of the lease having failed, the purchaser entered the premises; and, in ejectment by the lessee against the purchaser and the lessor, defendants relied on a breach of the covenant for continued occupancy. *Held*, that they were estopped to claim such breach.

Error to Mackinac; Shepherd, J. Submitted May 13, 1903. (Docket No. 62.) Decided May 29, 1903.

Ejectment by Henry S. Stoddard and Sadie E. Stoddard against Belle Gallagher and Charles J. Louisignau. From a judgment for plaintiffs on verdict directed by the court, defendants bring error. Affirmed.

J. J. Brown (*Henry Hoffman*, of counsel), for appellants.

C. J. Pailthorp, for appellees.

MOORE, J. The plaintiffs are residents of Chicago. The defendant Louisignau was the owner of a hotel on Mackinac Island, which was opened only during the summer season. In May, 1898, he leased the premises and the furniture therein to the plaintiffs for five years, the term to commence June 1, 1898, and to end October, 1903, at a rental for the term of $1,250, to be paid after the first year,—$250 January 1st each year for the following season. In the written lease was the following condition:

"And also that if the said premises, or any part thereof, shall become vacant during the said term, the said party of the first part, or his representatives, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor, and relet the said premises as the agent of the said parties of the second part, and receive the rent thereof, applying the same first to the payment of such expenses as he may be put to in re-entering, and then

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to the payment of the rent due by these presents, and the balance (if any) to be paid over to the said parties of the second part, who shall remain liable for any deficiency."

Shortly after the lease was made, the plaintiffs took possession of the premises, added furniture of their own to what was already there, paid their rent regularly, and kept the hotel as a tourists' hotel for the seasons of 1898, 1899, and 1900. It was their practice at the end of the season, in September or early October, to fasten the doors and windows of the hotel, leaving their furniture there, and reopen the hotel about the 1st of June. In December, 1900, Mr. Louisignau wrote Mr. Stoddard, saying the rent was due, and that he needed the money to pay his taxes, and asked Mr. Stoddard to send the money by registered letter or express. December 19th Mr. Stoddard transmitted the rent by express, and Mr. Louisignau gave to the express company a written receipt for the $250 as rent for the season of 1901. This receipt was delivered to Mr. Stoddard by the express company. March 22, 1901, Mr. Louisignau wrote Mr. Stoddard, saying he had a chance to sell the premises, and saying, "Of course I will return the $250 you paid for the coming season." Three days later Mr. Stoddard replied to this letter, saying plaintiffs had spent so much money on the house during the three years they had it, they thought the next two years would help them out, and offered to surrender the lease, with the furniture, for $1,000 and a return of the $250 rent paid in advance. April 25, 1901, Mr. Louisignau sold the premises on land contract to Mrs. Gallagher, who was and had been for some years a keeper of a boarding house not far from the premises in question. In the contract was the following provision:

"It is understood that above premises are under a lease to Henry S. Stoddard and Sadie E. Stoddard for five years from June 1, 1898, and second party herein assumes all risk and expenses in getting possession of said premises."

On the 2d of May, 1901, Mr. Louisignau wrote Mr. Stoddard, among other things, as follows:

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"The party that has bought the house is Mrs. Belle Gallagher, at the Island. The thousand dollars you ask besides the rent you can't have, as you aint entitled to it. Mrs. Gallagher will write you for the keys."

About the same time Mr. Louisignau sent Mr. Stoddard a draft for $250, which was at once returned to him by Mr. Stoddard, and was retained by him. May 10, 1901, Mrs. Gallagher wrote Mr. Stoddard a letter, stating, among other things:

"I have purchased the Brunswick, and, finding the doors and windows open, I took possession, as we were neither of us safe with the house in this condition. Now, I wish to make you a proposition: If you will leave the furniture you now have in the hotel for this season and next, I will board your wife and daughter from July 15th to September 5th this year and next."

This offer was not accepted, and shortly after Mrs. Gallagher sent the furniture belonging to the plaintiffs to them, in Chicago. Soon after this the plaintiffs found Mrs. Gallagher in possession of the premises, made a demand upon her for them, and, upon her refusal to give possession, this suit was brought.

Upon the trial Mrs. Gallagher claimed she found the premises vacant, and, under the terms of the lease, had a right to take possession. She sought to introduce testimony that the house leaked and the sills were rotted, for the purpose of showing plaintiffs had abandoned the property. This testimony was at first excluded, but was afterwards admitted. It is urged here, and was urged in the court below, that plaintiffs had allowed the property to become vacant, within the terms of the lease, thereby working a forfeiture.

One cannot read this record without reaching the conclusion that this claim is a pretext on the part of Mrs. Gallagher to avoid the consequences of her illegal acts. The hotel was, and for years had been, a tourists' hotel. The season for keeping it open was a short one. Though the lease was for five years, the time when it was to com-

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mence and end shows the parties understood it was for five seasons. At the close of the season the windows and doors were fastened up. The defendants knew this, and one of them, at least, and probably both of them, knew the plaintiffs lived in Chicago, except when the hotel was open for guests. After the third season, with full knowledge of these facts, a request was made of Mr. Stoddard to pay the rent for the season of 1901, according to the terms of the lease. This request was honored, and a receipt sent. When the two defendants entered into negotiations, one for the sale and the other for the purchase of the property, they both had knowledge of the plaintiffs' interest in the property by virtue of their lease, and we think the court was entirely right in saying the defendants are estopped from saying the house was vacant and the lease forfeited.

Judgment is affirmed.

The other Justices concurred.

PEOPLE, *for Use of* NATIONAL SEWER-PIPE CO., *v.* SHARP.

1. PRINCIPAL AND SURETY—FAILURE TO SECURE ADDITIONAL SURETY.

   One who signs a bond as surety upon the understanding that it shall also be signed by another, whose name appears in the body thereof, as a co-surety, is not liable where the bond is delivered without the latter's signature, and with a line drawn through his name therein.

2. SAME—AMENDMENT OF PLEA.

   It was not error to permit a surety on a bond, on the trial of an action thereon, to amend his plea by setting up that he signed the bond on condition that another should also sign it, which condition was not complied with; plaintiff having been given the option of a continuance, and having elected to proceed to trial.

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3. SAME—EVIDENCE—HARMLESS ERROR.

Where a surety on a bond defends on the ground that he signed on condition that another surety be obtained, which was not done, the restriction of his cross-examination by excluding evidence of his statements that he understood that one who did sign with him was a principal is not ground for reversal.

4. SAME.

In an action on a bond, the testimony of the sureties as to conversations with the principal at the time they signed it, to the effect that it should not be used unless also signed by a third person, is admissible, under proper pleadings, in view of the notice conveyed to the obligee by the presence of such third person's name in the body of the bond, both as part of the *res gestæ*, and as defining the obligation which the sureties were willing to undertake.

Error to St. Clair; Whipple, J. Submitted May 14, 1903. (Docket No. 70.) Decided May 29, 1903.

Assumpsit by the People of the State of Michigan, for the use and benefit of the National Sewer-Pipe Company, against Andrew Sharp and August Schultz, copartners as Sharp & Schultz, as principals, and Henry McMorran and Rudolph C. Wargowsky, as sureties, upon a statutory bond. From a judgment for defendant sureties, plaintiff brings error. Affirmed.

James A. Muir, for appellant.

George G. Moore, for appellee McMorran.

Avery Bros. & Walsh, for appellee Wargowsky.

MONTGOMERY, J. This is an action on a bond given for the protection of laborers and materialmen who should extend credit to Sharp & Schultz, contractors with the city of Ann Arbor for the construction of a sewer. The bond is in the sum of $5,000, and purports to have been executed by Sharp & Schultz as principals, and the defendants McMorran and Wargowsky as sureties. The plea of defendant McMorran was accompanied by a notice containing the following:

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"Defendant will further show that prior to the date of said bond, and about that date, he was requested by Rudolph C. Wargowsky to sign a bond in which the said Wargowsky and Andrew Sharp and August Schultz were principals, and this defendant and Lewis Kurtz should be sureties, and was assured that said Kurtz would be a party thereto, and his name was written in the body thereof, and this defendant never executed any other bond than one jointly with the said Kurtz as sureties and with the principals as aforesaid, unless he was deceived and defrauded in the execution thereof; that, after the execution by this defendant, the form of said bond was changed, and the name of said Kurtz omitted therefrom, whereby the same became void and of no binding force and effect."

This was followed by an affidavit denying the execution of the bond for the reasons stated in the notice.

When the case was called for trial, defendant Wargowsky was permitted to amend his plea by adding the following:

"Defendant will further show that, prior to the time of the signing of the bond which was signed by him, a bond was presented to him by Sharp & Schultz, the defendants above named, in which their names appeared as principals, and the names of Henry McMorran, this defendant, and Lewis Kurtz appeared as sureties, and said Sharp & Schultz represented to this defendant that one Lewis Kurtz signed said bond in addition to the said Sharp & Schultz, Henry McMorran, and this defendant, as a surety, and that this defendant would not be liable on said bond, and said bond would not be delivered and used, unless said Kurtz executed and signed the same, and relying upon these representations, and with the express agreement, understanding, and condition that the said Kurtz would sign said bond, and that said bond would not be delivered until said Kurtz had signed the same, said defendant Wargowsky signed the bond that he did sign, but that said bond contained the name of said Lewis Kurtz in the body thereof at the time he so signed the same; that, after the execution by this defendant of said bond mentioned, the same was altered and changed by the erasure of the name of the said Lewis Kurtz therefrom, whereby the same became void,"

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—And to attach an affidavit denying the execution of the bond set forth in plaintiff's declaration.

On the trial the issue presented to the jury as to each surety defendant was whether, at the time such surety signed the bond, the name of Lewis Kurtz appeared in the body of the bond, and whether it was so signed with the understanding that Kurtz was to also sign before delivery. The court instructed the jury that if the fact was so, and if the name of Kurtz was afterwards erased, and the bond delivered to the city authorities without his signature, the defendant sureties were not bound. This ruling was fully justified by the previous decisions of this court. *Johnston* v. *Township of Kimball*, 39 Mich. 187 (33 Am. Rep. 372); *Hessell* v. *Johnson*, 63 Mich. 623 (30 N. W. 209, 6 Am. St. Rep. 334). There was no error, therefore, unless it occurred in the proceedings on the trial, or in the refusal to grant a new trial.

It is contended that it was error to permit an amendment to the plea at the trial. When the amendment was allowed, the plaintiff was given the option of proceeding to trial or having a continuance, and elected to proceed to trial. The question of amendment was addressed to the sound legal discretion of the trial judge, and this discretion was not abused. *Wolscheid* v. *Thome*, 76 Mich. 265, 269 (43 N. W. 12); *Lester* v. *Thompson*, 91 Mich. 245 (51 N. W. 893).

It is contended that there was no evidence to substantiate McMorran's plea. This is mere assertion. We do not so read the record.

It is claimed that error was committed in restricting the cross-examination of McMorran by excluding testimony of his statements that he understood that Wargowsky was interested in the contract. While it is not clear that this might not properly have been admitted, it does not follow that its exclusion was damaging error. The name of Wargowsky appeared in the body of the bond as a surety, and, as the issue was defined for trial, it was narrowed to the question whether the name of Kurtz appeared in the

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bond when signed by the two defendant sureties, or whether it was written in and erased after they had signed. We are unable to see how the excluded testimony would have led to a different conclusion as to this question.

It is also contended that it was incompetent for the sureties to testify as to the conversations at the time the bond was signed, to the effect that the bond was not to be used unless Kurtz signed it. It is correct to say that such a statement by the principal would not have constituted a defense unless known to the public authorities whose duty it was to accept the bond, if Kurtz's name had not appeared in the body of the bond; but, when supplemented as it was by constructive notice to the city council by the insertion of the name of Kurtz as co-surety, it was competent, not only as a part of the *res gestæ*, but as defining the obligation which by the delivery of the incomplete instrument the sureties were willing to undertake. *Hessell* v. *Johnson*, *supra*.

The other questions raised do not call for extended discussion. We are convinced that no error was committed in refusing to grant a new trial, and that no prejudicial error appears in the record.

The judgment is affirmed.

The other Justices concurred.

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GOULD *v.* GREGORY.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.

   In an action for malicious prosecution on a charge of burglary, evidence considered, and *held* to justify a finding of want of probable cause.

2. SAME—MALICE.

   Malice in the prosecution of a criminal charge may be inferred from a want of probable cause therefor.

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3. SAME—EVIDENCE.

In an action for the malicious prosecution of a charge of burglary, it appeared that the charge was founded upon the taking by plaintiff of a horse and a basket from defendant's barn, and that plaintiff was at the time working for a tenant of defendant. *Held*, that evidence that the contract between defendant and his tenant required defendant to furnish two teams of horses, when necessary, and such farming utensils as might be needed, was admissible, though it was conceded that plaintiff was not acting under the tenant's orders on the occasion in question.

4. SAME.

Evidence of the size of defendant's farm was admissible as bearing upon the question of the right of the tenant, and of plaintiff, as his employé, to use the horse and basket alleged to have been stolen.

5. SAME.

In an action for malicious prosecution, evidence had been admitted upon the issue of malice that defendant had stated that some one had been down to the cottages owned by him, had broken into the boathouses, and had knocked holes in the boats, and that he thought plaintiff was to blame for it. *Held*, that evidence as to the number of cottages owned by defendant was admissible.

6. SAME—CONDUCT OF COUNSEL.

In an action for malicious prosecution, it appeared from the cross-examination of defendant that, while he had owned a certain farm for many years, he did not know just how many acres it contained; whereupon plaintiff's counsel said, "The idea that a man has owned a farm 80 years, and he does not know how many acres there are!" Immediately after, defendant testified that the farm lay upon a lake; that a good deal of it was fractional; that his son owned a part of it; and that, as he had not figured it up, he could not tell within a few acres how many acres there were. *Held*, that the remark of plaintiff's counsel was not prejudicial to defendant under the circumstances.

Error to Van Buren; Carr, J. Submitted April 9, 1903. (Docket No. 27.) Decided June 15, 1903.

Case by Rhett Gould against Albert E. Gregory for malicious prosecution. From a judgment for plaintiff, defendant brings error. Affirmed.

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Coy W. Hendryx and *Marshall L. Howell*, for appellant.

Hammond & Hammond and *T. J. Cavanaugh*, for appellee.

CARPENTER, J. Defendant instituted a criminal proceeding before a justice of the peace of the county of Cass charging plaintiff with breaking and entering his barn with intent to steal a horse and a basket. On the day set for the examination, plaintiff was discharged at the request of the prosecuting attorney. He thereupon brought this suit to recover damages for malicious prosecution, and obtained a verdict and judgment in the lower court. Defendant asks a reversal of the judgment of the court below on the ground that the court erred in submitting the case to the jury, and in admitting certain testimony which will be hereinafter referred to.

1. Defendant insists that the court should have directed a verdict in his favor, because (*a*) there was no evidence of want of probable cause; (*b*) the testimony conclusively proves that in making the complaint defendant acted under the advice of counsel, to whom he had stated all the material facts; (*c*) there was no evidence of malice.

The testimony clearly proved that plaintiff did, early in the morning of November 1st, let defendant's horse out of his barn, and take his basket therefrom. For the purpose of determining whether the defendant was justified in believing that this act was done with criminal intent, a somewhat detailed statement of the facts is required. Plaintiff had for some days been employed as a hired man by one Olmsted. Olmsted was defendant's tenant, working on shares a farm adjacent to the barn in question. By the terms of the contract between defendant and Olmsted, the former was to furnish two teams to be used by the latter "in working the said farm, when necessary," and also such farming tools "as may be needful." The horse in question was one that defendant had furnished Olmsted, and had been used by plaintiff as Olmsted's hired man.

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On the morning in question, though the plaintiff was not being paid wages by Olmsted, he was performing services for him. According to plaintiff's testimony, what he did was this: He opened the stable door of defendant's barn, which was fastened only by a button, and let the horse, which was loose in a box stall, out into an adjoining pasture, in order that it might get food and water. He took the basket to Olmsted's for the purpose of using it, and did use it, to load potatoes. In letting the horse loose and in getting the basket, plaintiff was not acting under instructions from Olmsted. Before defendant made the complaint, the horse was in his possession. He knew that it was found loose in the road by Olmsted about 4 p. m. of the day the alleged crime was committed. He also knew the basket was at Olmsted's.

No authority need be cited to prove that these facts would not constitute probable cause. They would clearly not justify defendant in believing that plaintiff broke and entered his barn with intent to steal his horse and basket. Defendant, however, insists that these are not the facts, or, at least, that they are not the facts as he believed and was justified in believing. He insists that the horse was fastened in its stall by a halter, and that plaintiff led it away from the barn. He insists that the barn door was locked, or securely fastened. He testifies that he had an interview with Olmsted before making the complaint, and that Olmsted said he did not know which way the horse came from when he found it in the road at 4 p. m., and that when plaintiff brought the basket to his house Olmsted told him he would get in trouble. Defendant also insists that plaintiff, at the time he entered the barn, as he was informed by his son, Don Gregory, acted in a manner which would tend to convince an observer that he was conscious of wrong-doing.

Assuming that these facts constitute probable cause, we are nevertheless bound to hold that the trial court did not err in refusing to direct a verdict. Neither that court nor this court can say, as a matter of law, that defendant

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believed these to be the facts. There was a marked conflict between his testimony and that of plaintiff as to whether the horse was tied and the barn door fastened. The jury, if they accepted plaintiff's testimony, could have found that defendant never believed that plaintiff led the horse away. There was a marked conflict, too, between the testimony of defendant and that of Olmsted. Olmsted denies having any conversation with defendant until after plaintiff's arrest. Olmsted testifies that it is not true that the first he saw of the horse the day the alleged crime was committed was at 4 p. m. On the contrary, he testifies that he saw the horse in the pasture field between 9 and 11 a. m.; that the horse was breachy, and he presumes that he got into the road by jumping the fence. If the jury believed Olmsted's testimony, defendant did not have by any means as much evidence of plaintiff's guilt as he contends.

This reasoning compels us also to decide that the court did not err in refusing to direct a verdict for defendant on the ground that he had fully and fairly stated the facts in the case to his counsel; for the testimony shows—what we should know without testimony—that the facts he stated to his counsel were those which he insists he believed. If the jury accepted plaintiff's testimony, they would be warranted in saying that defendant did not make a full and fair statement of the facts to his counsel. Moreover, it does not conclusively appear that defendant told his counsel of Olmsted's right to use the horse and tools, and of plaintiff's relation to Olmsted.

Neither do we think that the court should have directed a verdict for the defendant on the ground that there was no evidence of malice. Malice may be inferred from want of probable cause. *Carson* v. *Edgeworth*, 43 Mich., at page 247 (5 N. W. 282); *Hamilton* v. *Smith*, 39 Mich., at page 229. Moreover, one witness testified that defendant said, before the alleged crime was committed, that plaintiff's "place was in Jackson, and he would like to see him there."

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This case received the attention of this court on a former occasion, and is reported in 126 Mich. 594 (85 N. W. 1077). On that occasion each of the foregoing points was made. The evidence presented by that record was in every material particular that presented by this. The majority of the court, as then constituted, reached the same conclusion as that indicated in this opinion.

2. Complaint is made because the court permitted plaintiff to prove the contract relations of defendant and Olmsted. Counsel say:

"It was immaterial and irrelevant what the contract relation between Olmsted and Gregory was, for the reason that Gould was not acting under the instruction or request of Mr. Olmsted in the exercise of any of his rights under the contract."

Though the plaintiff was not acting under Olmsted's orders, the jury might properly have inferred that he entered defendant's barn and did the acts complained of because of the obligations resting upon him as a hired man of Olmsted; and therefore the contract relations between Olmsted and Gregory were material.

3. On the cross-examination of defendant, plaintiff's counsel was permitted to prove the number of acres in defendant's farm and the number of cottages owned by him at Magician Lake. Defendant's counsel urge that the purpose and effect of this testimony was simply to prejudice the jury against defendant by proving that he was a man of some wealth. We cannot assent to this reasoning. We are unable to say that the size of defendant's farm would not have some bearing upon the rights of his tenant, Olmsted, and of his hired man, the plaintiff, to handle the horse and use the basket claimed to have been stolen. As already noted, defendant was to furnish two teams "in working said farm, when necessary," and tools "as may be needful." Nor was it improper to ascertain how many cottages defendant owned. For the purpose of establishing malice, a witness for the plaintiff had testified that defendant had stated "somebody had been down to his cot-

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tages, and had broken into the boathouses, and knocked holes in the boats, or something of that kind, and that he thought Mr. Gould was to blame for it."

In the course of this cross-examination, it transpired that, though defendant had owned the farm for many years, he was not certain just how many acres it contained, and, after the court had first ruled (a ruling which he subsequently changed) that this was a collateral matter, plaintiff's counsel said, "The idea that a man has owned a farm 30 years, and don't know how many acres there is!" While we agree with counsel for defendant that, under the circumstances, this remark was improper, we do not think it was reversible error. Immediately thereafter defendant testified:

"That farm lies upon the lake, and it is all of it fractional; that is, there is a good deal fractional. * * * My son now owns a part of it, and I really haven't figured up to see. It is divided by section lines and quarter lines, and within a few acres I couldn't tell."

With this explanation, we are unable to see how defendant could be harmed by the remark complained of. Indeed, that remark is more likely, under these circumstances, to have prejudiced plaintiff than the defendant.

As we find no reversible error complained of in defendant's original brief, the judgment of the court below will be affirmed.

The other Justices concurred.

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WOLCOTT v. TWEDDLE.

1. APPEAL—DECREE—WRONG REASON FOR RIGHT RESULT.
   A decree which is as favorable to appellant as he had a right to ask will not be reversed because a wrong reason was given by the court for the conclusion reached.

2. FRAUDULENT CONVEYANCES—MORTGAGES—REDEMPTION—SUBROGATION—HOMESTEAD.
   Where a conveyance of mortgaged lands is set aside, except as to a homestead interest, at the suit of an execution creditor, the grantee, on redeeming from the mortgage, is entitled, in the absence of special circumstances, to be subrogated to the full extent of the mortgage lien, as against a purchaser at the execution sale. *Rhead* v. *Hounson*, 46 Mich. 243, disapproved.

3. SAME—APPEAL—RIGHT TO COMPLAIN.
   However, a decree requiring the homestead interest to bear its proportion of the mortgage debt was not disturbed, where the rents and profits of the premises, together with the proceeds of an insurance policy thereon, received by the grantee, more than equaled the amount deducted by the court from his claim under the mortgage.

Appeal from Kent; Perkins, J. Submitted April 9, 1903. (Docket No. 25.) Decided June 15, 1903.

Bill by Laurens W. Wolcott and Cyrus E. Perkins, copartners as Wolcott & Perkins, against John J. Tweddle, to foreclose certain liens. From a decree for complainants granting insufficient relief, they appeal. Affirmed.

Taggart, Denison & Wilson, for complainants.

John J. Tweddle (*E. A. Maher*, of counsel), *in pro. per.*

CARPENTER, J. Prior to November 5, 1897, Bernard Fingleton owned a farm in Ada township, Kent county, comprising about 120 acres, and including his homestead. On that day he delivered a deed of the premises to Jennie

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Flood. He was then owing an indebtedness, which on October 17, 1899, was reduced to a judgment against him, with others, in favor of Harry D. Jewell, judge of probate, for the use and benefit, etc., for the amount of $933.05 damages and $40.90 costs. Upon this judgment, execution was levied upon the entire premises so conveyed to Jennie Flood. The execution creditor, the judge of probate, thereafter filed a bill in aid of execution against Bernard Fingleton and Jennie Flood. In the case so commenced, a final decree was entered October 22, 1900, by which it was decreed that the conveyance from Bernard Fingleton to Jennie Flood should be set aside for invalidity against the complainant, as a creditor of Fingleton, except as to the homestead interest of Fingleton in the premises conveyed by the deed to Jennie Flood, which homstead interest was by the decree declared to be exempt from the operation of the decree. On the 29th day of September, 1900, while the bill in aid of execution was pending, Jennie Flood conveyed the entire premises, by a quitclaim deed, to the complainants in this case, Laurens W. Wolcott and Cyrus E. Perkins, composing the firm of Wolcott & Perkins, who had been acting to some extent as her solicitors in the litigation.

Bernard Fingleton, before delivering the deed to Jennie Flood, executed a mortgage upon the entire premises to Frances Eby for $2,500. The good faith and validity of this mortgage were never questioned, and it has always been conceded to have been, in the hands of the mortgagee, a lien upon the entire premises, paramount to the claims and rights of all the other parties. Foreclosure of this mortgage was commenced, and a final foreclosure decree was entered December 10, 1900. A foreclosure sale was made by the commissioner on March 2, 1901, at which time the entire premises were sold to L. Frank McKnight for the sum of $2,440.87; the sum received upon such sale being $1 in excess of the total amount due at the date of the sale, under the decree, for principal, interest, and costs. The time for redemption from this sale expired

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September 2, 1901. On August 29, 1901, Wolcott & Perkins, being the owners of the equity of redemption in the premises subject to the execution levy, redeemed from the mortgage foreclosure sale, paying to the purchaser, through the register of deeds, the full amount, with interest, being $2,512.87.

On January 14, 1902, the entire premises were exposed for sale under the execution levy, as aided by the chancery decree. At this sale it was agreed between the execution creditor and Wolcott & Perkins that, instead of setting off a separate homestead, the entire premises might be sold together, subject to the $1,500 homestead lien. The sale was made accordingly. This agreement was embodied in the sheriff's certificate of sale, and John J. Tweddle, the defendant, became the purchaser, paying therefor two days later $1,205. The total value of the premises at this time was $4,000. At the execution sale these complainants, Wolcott & Perkins, gave notice that they claimed not only the $1,500 homestead lien upon the premises, but also a lien by subrogation for the entire amount of the Eby foreclosure sale, which they had been compelled to redeem from and pay in order to protect their homestead interest, making their total lien upon and claim against the premises $4,069, subject to which, they insisted, any purchaser at the sale would take the property. Later in the same day, and before Mr. Tweddle, the purchaser, had paid anything, they embodied these claims and demands in a formal written notice duly served upon him.

About January 1, 1898, a barn standing upon the homestead part of the premises, of the value of $1,072, was destroyed by fire, for which Mrs. Flood obtained that amount upon insurance. She paid $467.70 of this upon the mortgage debt, so that she retained a net balance from the insurance money of $604.30; and this, with interest at 5 per cent. to the time of the entering of the decree in the court below, would amount to upwards of $745. No account was taken of this matter in making the decree.

Mr. Tweddle, the purchaser, declining to make pay-

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ment of this amount, the complainants thereupon, on January 16, 1902, filed this bill of complaint. They set up the facts hereinbefore recited, and alleged that, by virtue of their redemption from the Eby foreclosure sale, they became subrogated to the position of the mortgagee, and entitled to enforce the entire mortgage claim against the entire premises. They alleged, also, that the defendant purchased at the execution sale with full knowledge of their claim, and took the premises subject both to the mortgage subrogation claim and to the homestead claim. They asked for a decree declaring, enforcing, and foreclosing these two liens. The court below held that the complainants were entitled to subrogation on account of their redemption from the Eby foreclosure, but that the homestead interest, being subject to this mortgage, and being three-eighths of the entire value of the mortgaged property, should bear three-eighths of the mortgage burden. He therefore charged the premises with a lien in favor of complainants for the $1,500 homestead interest, and $1,570 of the portion paid for the redemption of this mortgage, but denied the complainants' claim for a lien for the balance of the redemption money, viz., about $941. Complainants appeal.

The court below reached the conclusion stated upon the authority of the case of *Rhead* v. *Hounson*, 46 Mich. 243 (9 N. W. 267), which case apparently supported the holding of the circuit judge. In that case the owner of property consisting of a homestead and other lands, subject to a mortgage covering the whole, made a conveyance fraudulent as to creditors. This conveyance was attacked, and the court held not only that the conveyance was void as to the excess over the homestead interest, but that the homestead interest should bear its proportion of the incumbrance in an adjustment of equities between a purchaser at an execution sale and the fraudulent grantee. Were the question involved in that case the only one to be considered in the present case, we should be compelled to hold that that case is not in line with numerous

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decisions of this court before and since its promulgation, and should not hesitate to overrule it. It has been frequently decided that, in foreclosure proceedings covering a homestead and other lands, the primary fund for the payment of the mortgage is the land other than the homestead. It has also frequently been decided that by a conveyance of premises in which a homestead interest exists in the grantor, and an incumbrance covering that and other property, in which the aggregate of the incumbrance and the homestead interest exceeds the total value of the property, no fraud can be said to be perpetrated as against existing creditors. The cases of *Armitage* v. *Toll*, 64 Mich. 412 (31 N. W. 408), and *Kozminski* v. *Kuzniak*, 118 Mich. 621 (77 N. W. 242), are, in principle, inconsistent with the holding of *Rhead* v. *Hounson*.

It remains to be considered whether the complainants in this case are entitled to any greater lien than the court decreed. If the decree of the court below was as favorable to complainants as they had a right to ask, it will not be reversed because a wrong reason was given for the conclusion reached. By the decree in Jewell against Fingleton and Flood, it was determined that the deed from Fingleton to Flood should be set aside, vacated, and declared null and void and of no effect whatever as against the complainant in that case, except as to the homestead interest of Bernard Fingleton in the premises, which was declared to be exempt from the operation of the decree. The homestead interest referred to in that decree was, of course, the homestead interest possessed at the time the conveyance was made. The complainants stand in the same relation to this property as would Mrs. Flood had she not conveyed the land. It appears by her testimony that she bought subject to this mortgage. In one proceeding she stated that she had assumed to pay the mortgage. In her testimony used in this case she stated that she was to pay the interest on the mortgage, and the fair import of her testimony, as qualified by testimony given in this case,

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is that she did assume to pay the mortgage, provided she had the property. As we have seen, after the conveyance to her there came into her hands $1,072 insurance money, which was received in substitution for the *res* to that extent. Of this she applied but a portion in payment on the mortgage, leaving a balance in her hands of $604.30, derived from this conveyance, and which should, in equity, have been applied, as of the date of its receipt, in extinguishment of the mortgage lien. If interest on this be computed to the date of complainants' redemption,—say, 3½ years,—the amount is $710.50. If Mrs. Flood's testimony be accepted that she was to pay the interest on the mortgage, it must be assumed that this arrangement and understanding was made without reference to the insurance money, as it was, of course, not known at the time that this would come into her hands. But, apart from any such arrangement, it was fairly equitable that she should pay this interest money. From the time of the conveyance to her, in 1897, she and her grantees have had the use of the entire premises. It would be grossly inequitable to permit the grantee in this fraudulent conveyance to shelter herself behind this homestead claim, reduce to her possession all that has substance in the remainder of the estate, and still assert that in equity she is entitled to subrogation for the discharge of this lien upon the property, granted fraudulently and with the purpose of defeating creditors.

At the time of the conveyance, the property, in its then condition, was worth $5,000, with the buildings intact. It was subject to a mortgage of $2,500 and a homestead right of $1,500, leaving an interest of at least $1,000 which creditors had the right to reach. The possession acquired under this conveyance, valid only as to the homestead interest, has enabled the grantee to receive all the rents and profits from the day of her deed, November 5, 1897, until August 29, 1901, without further investment, and to obtain the insurance money above referred to. The property has in the meantime, by reason of the destruction of

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the barn, from which the insurance was realized, been reduced in value to $4,000. The right of the creditors to pursue the property has, according to complainants' contention, vanished, as the mortgage and the homestead interest, if both are given full priority, fully equal the value of the property. This is not equity. The doctrine of subrogation is administered upon equitable principles. If Mrs. Flood had applied at the time of its receipt the proceeds of the insurance on this barn, and was charged with the value of the rental of this land over and above the homestead interest, it is unquestionable that the amount which she would be entitled to assert as a claim to subrogation would be less than that awarded to her by the court below. While the evidence is not very clear as to the rental value of the land, it may fairly be assumed that it bore some relation to the value of the property; and, upon any basis which the record affords, we think it appears that the insurance money, added to the rentals with which complainants and their grantor should be charged, exceeds the amount which they assert as an added claim against the land.

The decree was sufficiently favorable to the complainants, and will be affirmed, with costs of this court to appellee.

The other Justices concurred.

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PREFERRED TONTINE MERCANTILE CO. v. SECRETARY OF STATE.

MANDAMUS—CORPORATIONS—ARTICLES OF ASSOCIATION—FILING.

Mandamus will not issue to compel the Secretary of State to file the articles of association of a foreign corporation (*e. g.*, a tontine investment company), where, subsequent to the filing of the petition, a statute has become operative under which the rights claimed by relator have been abrogated.

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Mandamus by the Preferred Tontine Mercantile Company to compel Fred M. Warner, Secretary of State, to file relator's articles of association. Submitted May 12, 1903. (Calendar No. 19,642.) Writ denied June 15, 1903.

Groesbeck & Berger, for relator.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), for respondent.

GRANT, J. On October 16, 1902, relator, a corporation organized under the laws of Missouri, filed its petition to compel the respondent, Secretary of State, to file its articles of association. On November 18th, respondent answered, admitting his refusal to file its articles, upon the ground that its business proposed to be carried on was against public policy, and its contracts unlawful and void. On December 1st, relator filed a petition to frame issues of fact. On April 30, 1903, the proposed issues were presented to the court. The respondent denies the necessity of any issues of fact; alleging that the articles of association and contracts, copies of which are attached to the answer, and the announcements made by the company, also attached, show upon their face the illegal character of the relator's business.

The respondent has filed in this court a certified copy of an act of the legislature which was approved April 27th last, and given immediate effect. Act No. 60, Pub. Acts 1903. This is an act "to provide for the regulation in this State of foreign tontine, bond, certificate, and investment companies, partnerships, and associations," etc. This act has evidently abrogated the rights claimed by the relator under the law as it stood before the passage of this act. It would be of no advantage to relator to have its rights under the former law determined. The writ of *mandamus* would be useless, even if we should hold now that relator was entitled to do business under the law as

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it was when the petition was filed. Its right to do business must now be determined by the new act.

The writ is denied.

The other Justices concurred.

PERE MARQUETTE RAILROAD CO. *v.* CITY OF LUDINGTON.

1. RAILROADS—TAXATION—EXEMPTIONS.
   A stock of groceries kept by a railroad company to furnish supplies for the crews and passengers of a line of steamboats operated by it under authority of 2 Comp. Laws, § 6269, is not subject to taxation under the general tax law, but is expressly exempted therefrom by 2 Comp. Laws, § 6277, providing for the payment of specific taxes by railroad companies "in lieu of all other taxes upon the properties of such companies," except certain specified real estate.

2. TAXES—PAYMENT UNDER PROTEST—LIMITATION OF ACTIONS.
   The provision of 1 Comp. Laws, § 3876, limiting to 30 days the right to sue to recover taxes paid under protest as therein provided, has no application to an action to recover taxes paid involuntarily, though such payment was accompanied by a written protest.

Error to Mason; McAlvay, J. Submitted April 23, 1903. (Docket No. 44.) Decided June 15, 1903.

Assumpsit by the Pere Marquette Railroad Company against the city of Ludington to recover taxes paid under protest. From a judgment for defendant, plaintiff brings error. Reversed.

M. B. Danaher (*F. W. Stevens*, of counsel), for appellant.

Henry C. Hutton, for appellee.

CARPENTER, J. This is a suit brought by the plaintiff to recover from the defendant a tax claimed to have been

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illegally assessed, and paid involuntarily and under protest. In the year 1899 the city of Ludington assessed the tax against the plaintiff on account of its ownership of a stock of groceries, of the value of about $1,000, situated in its warehouse in said defendant city. This stock of groceries was kept to furnish supplies for the crew and passengers on a line of steamboats owned and operated by plaintiff. These boats ran between said city of Ludington, one of plaintiff's *termini* upon Lake Michigan, and points in Wisconsin. On February 28, 1900, the city treasurer of Ludington, under a warrant for the collection of said taxes, levied on certain personal property of plaintiff. Thereupon, under a written protest, plaintiff paid the tax, and subsequently, on the 9th of April, commenced this suit. The case was tried before the judge without a jury, who, after finding the foregoing facts, rendered a judgment for the defendant, on the ground that the assessment was legal and the suit not brought within the time limited by law. We are called upon to consider the correctness of each of these holdings.

1. The legality of the assessment under consideration depends on whether the stock of groceries was taxable under section 6277, 2 Comp. Laws. That section reads:

"Every railroad company and union railroad station and depot company owning or operating any railroad situated in whole or in part in this State shall, on or before the first day of July in each year, pay to the State treasurer, on the statement of the auditor general, a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, namely: Upon all such gross income not exceeding $2,000 per mile of road actually operated within this State, two and one-half per cent. of such gross income; upon such gross income in excess of $2,000 and not exceeding $4,000 per mile, three and one-fourth per cent. thereof; upon all such gross income in excess of $4,000 and not exceeding $6,000 per mile, four per cent. thereof; and upon all such gross income in excess of $6,000 per mile, and not exceeding $8,000 per mile, four and one-half per cent. thereof; and upon all

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such gross income in excess of $8,000 per mile of the road so operated, five per cent. thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of $20,000 per mile shall pay on all such gross incomes in excess of $20,000 per mile of road so operated ten per cent. thereof. And when the railroad lies partly within and partly without this State, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this State such proportion of the income of said company arising from interstate business as the length of the road over which said interstate business is carried in this State bears to the entire length of the road over which said interstate business is carried. The taxes so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this State, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road; but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated."

It is contended by defendant, notwithstanding the fact that section 6269, 2 Comp. Laws, authorizes plaintiff to own and operate the line of steamboats, that the language, "the taxes so paid shall be in lieu of all other taxes upon the properties of such companies," except certain specified real estate, does not relieve plaintiff from liability to pay taxes upon said steamboats and the supplies used thereon. This contention places a narrow and strained construction on the language above quoted. In violation of sound principle and authority (Suth. Stat. Const. § 328; *Sherwin* v. *Bugbee*, 16 Vt., at page 445; *Brocket* v. *Railroad Co.*, 14 Pa. St., at page 243 [53 Am. Dec. 534]; *Miller* v. *Kirkpatrick*, 29 Pa. St., at page 229), it attempts to add other exceptions to those specified in the statute.

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It is argued that this construction, excepting steamboats and their supplies from the property exempted, is warranted by the language of the statute itself. It is argued that, since the specific tax is upon "the property and business of such railroad corporation operated within the State," the exemption cannot be extended to the line of steamboats, which are operated in part outside the State. The language above quoted points out the subjects on account of which the specific tax is paid. The statute provides that, on account of its property,—which, in the absence of qualifying words, means its taxable property,—and its business operated in this State (and this would comprise all its taxable interests), the railroad company shall pay as a specific tax a certain part of its gross income. There is nothing in this language to indicate that the property on account of which the specific tax is paid is anything less than the entire taxable property of the railroad company, for surely the words "operated within the State" qualify the word "business," and that word only.

The argument is also made that, according to the proper construction of section 6277, the gross income upon which specific taxes are paid includes no part of the revenue derived from steamboats, and therefore said steamboats are taxable. This argument is very forcible, if the assumption upon which it is based is well founded, for it is scarcely conceivable that the legislature intended to exempt both the steamboats and their earnings from taxation. We do not think, however, that said assumption is well founded. We cannot agree with defendant that, according to the proper construction of section 6277, the gross income upon which the specific tax is paid includes no part of the earnings of the steamboats. Defendant argues that the steamboats are taxable because their earnings are not taxable. We think, however, there is greater force in the opposing argument, that, as the steamboats are exempt from taxation, their earnings are not.

The court below relied, and defendant's counsel now

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relies, upon the case of *Illinois Central R. Co.* v. *Irvin*, 72 Ill. 452. There it was held that legislation exempting the plaintiff railroad company from taxation "upon all the property and assets of every name, kind, and description belonging to said corporation" did not apply to a steamboat and wharfboat owned by it, and used in transferring passengers and freight. That decision is based upon the ground that the railroad company was not authorized by its charter to "engage in carrying by water, or otherwise than by the lines of railway so to be constructed." That reasoning, applied to the facts in this case, would lead to an entirely different conclusion, and entitle plaintiff to judgment.

If plaintiff is under no obligation to pay taxes upon its line of steamboats otherwise than by paying a percentage of its gross income, no argument would seem necessary to prove that supplies of food for the boats, like supplies of fuel for the engines on its railroad, are not taxable.

Defendant's counsel apprehends injury to the public if the railroad company is permitted to invest money to the amount of $1,000 in groceries and be exempt from paying taxes thereon. If the plaintiff had deposited this $1,000 in the bank as a fund for the purchase of supplies from day to day, obviously it would have escaped taxation upon this money, and it is just as obvious that the injury to the public would have been the same as it now is. In establishing a specific tax in lieu of all other taxes, we do not think the legislature intended to prevent railroad companies purchasing supplies at such times and in such quantities as business judgment might demand. This decision does not, as defendant's counsel seems to fear, establish a precedent which exempts supplies purchased by the railroad company for the purpose of "going into the grocery business." The reasoning of this case, as we think must be apparent to every reader, applies only to supplies intended to be used for some legitimate purpose of the corporation.

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2. The circuit judge held that section 3876, 1 Comp. Laws, was applicable to this case, and prevented a recovery by the plaintiff, because it waited more than 30 days after paying the tax in question before commencing this suit. Section 3876 reads:

"Any one * * * may pay any tax, whether levied on personal or real property, under protest, to the treasurer, specifying at the time, in writing signed by him, the grounds of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within 30 days and not afterwards, sue the township for the amount paid, and recover if the tax is shown to be illegal for the reason specified in such protest."

No protest was required, either before this statute was passed or since, to recover the taxes in question, because they were paid involuntarily. See *Cox* v. *Welcher*, 68 Mich. 263 (36 N. W. 69, 13 Am. St. Rep. 339). Plaintiff's right of action, therefore, does not rest upon this statute. If it had made no protest at all it could have recovered, and then, clearly, the 30-day limitation would not have applied. The right to recover without making a protest surely was not lost by making a protest. The 30-day limitation, therefore, applies only to cases in which, without a protest, one cannot recover back taxes paid by him. It does not apply to this case.

We conclude, therefore, that the judgment of the trial court must be reversed, and a judgment entered in this court for plaintiff, with costs of both courts.

The other Justices concurred.

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DAILEY *v.* SAGINAW BUILDING & LOAN ASSOCIATION.

1. BUILDING AND LOAN ASSOCIATIONS — MINIMUM PREMIUM — COMPETITIVE BIDDING.
   A by law of a building and loan association fixing a minimum premium is not prejudicial to a borrower, where his loan is made at an advance after competitive bidding.

2. SAME — FORECLOSURE — SETTLEMENT — BILL OF REVIEW.
   Where, subsequent to a foreclosure decree in favor of a building and loan association, the borrower claimed that he had not been credited with certain payments, and the association returned to him a part of the amount claimed, taking his receipt in full of all claims of every kind against the association, he could not afterwards maintain a bill to review the decree upon the ground that he was entitled to credit for further payments, and for certain fines which had been unlawfully imposed.

3. SAME — PLEADING.
   The fact that a settlement between a building and loan association and a borrower, had after foreclosure against both the borrower and his wife, was participated in by him alone, will not warrant reversing an adverse decree on a bill of review brought by both, where it was not relied on in the bill.

Appeal from Saginaw; Beach, J. Submitted May 15, 1903. (Docket No. 85.) Decided June 15, 1903.

Bill by George W. Dailey and Mary Dailey against the Saginaw Building & Loan Association and Mary G. Lewis to review a decree of foreclosure. From a decree dismissing the bill, complainants appeal. Affirmed.

George C. Ryan (*Eugene A. Snow*, of counsel), for complainants.

Nathan S. Wood, for defendants.

MONTGOMERY, J. This is a bill in the nature of a bill of review. The original bill was a foreclosure bill, and

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was filed on November 3, 1894. There was personal service. The Daileys appeared by their solicitor, Mr. Emerick. There was a waiver of service of further notices, and decree was entered in the sum of $3,041.52 and costs, and a sale was advertised, under the decree, for December 21, 1895. Mr. Dailey was present, and asked for and procured an adjournment to December 26th, when a sale of the property was made for $3,000, and a deficiency of $304.21 reported. The building association took possession soon after the sale. Four years after this sale was made, complainants, Dailey, discovered receipts for money paid to the association aggregating $185, which appeared not to have been credited to the Daileys in the foreclosure proceeding. Negotiations were had between themselves, represented by their attorney, and the association, and in November, 1899, nearly four years after the sale, the amount represented by these receipts, with an agreed rate of interest, was paid to Dailey; and a receipt was given, reciting that it was in satisfaction of any and every claim of every kind and character against said association.

The present bill of complaint was filed in February, 1901, more than a year after this settlement, and more than five years after the decree. The bill sets up the claim that, in making the original loan of the association, a minimum premium was fixed by the association of 25 per cent., and that the Daileys' bid was 30 per cent. on the loan. They also set up the claim that they had not received credit for the $185, and did not discover this error until 1899; but it is conceded that the matter was then adjusted, and the money repaid them. They also claim that other payments were made for which no credit was given, and seek to prove this by entries in books in their own possession, and claim that certain fines imposed were improper.

The evidence discloses that there was a by-law fixing a minimum premium of 25 per cent.; but it also appears that the several loans in which complainants are interested were made after competitive bidding, and that the

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premiums bid, and upon which the loans were awarded, were 30 and 31 per cent. It further appears that all loans made up to the time that complainants' loans were effected were made upon competitive bidding, and at a per cent. considerably above the minimum fixed by the rules. Under these circumstances, it cannot be said that the rule worked any damage to the complainants. The benefit of free and competitive bidding was had, the same as though no fixed minimum premium had been adopted. While the authorities are not numerous upon the question, a well-reasoned case (*Orangeville Mut. Sav. Fund & Loan Ass'n* v. *Young*) is reported in 9 Wkly. Notes Cas. p. 251. See, also, *Albright* v. *Building & Sav. Ass'n*, 102 Pa. St. 411, 424; Endl. Bldg. Ass'ns, § 411.

The bill also sets up a claim that, in the exchange of property between the defendant Mary G. Lewis and complainants, a loan had been effected upon the property exchanged by Mrs. Lewis with complainants of $400, and that this was concealed from complainants, and that the defendant association was a party to the fraud which was perpetrated upon complainants by such concealment. This is a serious charge, which presents a question of fact, and complainants' claim is supported solely by the testimony of Mr. Dailey. By the overwhelming weight of testimony, this claim is shown to be without any basis of fact. The documents introduced in evidence, and the course of dealing of the parties, leave in our minds no room for doubt that this mortgage was placed upon the property before the exchange was made, and was well known to the complainants, and taken into account in the exchange. Not only are we convinced of this, but so clearly does the testimony satisfy us of this conclusion that we should hesitate to base a decree upon the unsupported recollection of the complainant Dailey. He is so clearly in fault in this particular that the inference of either bad faith or a want of accurate recollection should be applied with more or less force to his other testimony in the case.

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The claim is made that a considerable amount of money was paid into the association for which the complainants have not received credit. We cannot overlook the fact that there has been a long delay in asserting this claim. The secretary of the association at the time the payments are claimed to have been made is now at a distant place, and is shown to have been dishonest. But it is significant that the books in which the credits were given were always open to the complainants, and that investigation of these books was attempted at a time when the settlement hereinafter referred to was made. We should hesitate after this lapse of years to base a decree upon the unsupported testimony of complainants to these payments. But a more complete answer to this claim exists. The bill of complaint recites the discovery by complainant of certain receipts from the building and loan association, an investigation, and the settlement and adjustment hereinbefore referred to, in which a release was given of all claims made by complainant against said association for money which he claimed to have paid the association on account of any and every loan or advance made to him by the association, and of any and every claim of every kind and character against said association growing out of his relations thereto. The only attack made upon this settlement is the complainants' claim that other facts and the fraud set forth in the bill were not then known to the complainants; and it is claimed on the hearing that the settlement only related to payments which aggregated $185, while, as a matter of fact, it is now claimed that something more than $800 had been paid and not credited.

We are satisfied from the record that other claims in excess of the claim of $185 were made at the time, and that this settlement was intended to be a final and definite settlement of all matters in controversy between the parties. It should be borne in mind that at this time a deficiency decree of $304.21 existed in favor of the association against complainants. At the time complainant claims to have discovered that he had not been credited

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with all that had been paid by him, he had the means of ascertaining, as he has since ascertained, all the facts in relation thereto. The testimony of the witnesses who were members of the committee is to the effect that other claims than the $185 were in fact made. It was clearly the duty of the complainant to then assert whatever claims he had to make. There certainly was no fraud or artifice practiced by the association at this time. The payment was made upon the definite agreement that it should be final, and we think it should be so treated. It is suggested that the complainant Mary Dailey was not a party to this arrangement; but the answer to this is that the bill of complaint proceeds upon no such theory. On the contrary, it recognizes the settlement, and only attempts to avoid it by matters common to both Mr. and Mrs. Dailey.

The only other question which need be referred to is the alleged imposition of excessive fines. The total amount of fines imposed is stated to have been $131.43. It is not accurately shown to what extent these were excessive, but we think the question is open to the same considerations that the alleged overpayments are. After this decree had passed, and the error had been discovered, we think it was incumbent upon the complainants to make their claims once and for all, and that, when the receipt was given under the circumstances detailed, it constituted a complete accord and satisfaction. *Freeman* v. *Freeman*, 68 Mich. 28 (35 N. W. 897).

The decree of the court below will be affirmed, with costs.

The other Justices concurred.

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MICHIGAN MUTUAL LIFE-INSURANCE CO. *v.* COMMOM COUNCIL OF DETROIT.

TAXATION—LIFE-INSURANCE COMPANIES—RESERVE FUND.

The reserve fund of a life-insurance company is properly included among its liabilities in determining the net assets of the company for the purpose of taxation under 1 Comp. Laws, § 3834.

Certiorari to Wayne; Brooke, J. Submitted June 2, 1903. (Calendar No. 19,973.) Decided June 15, 1903.

Mandamus by the Michigan Mutual Life-Insurance Company against the common council and the board of assessors of the city of Detroit to compel the reduction of an assessment against relator. From an order granting the writ, respondents bring *certiorari*. Affirmed.

C. A. Kent, for relator.

Timothy E. Tarsney, for respondents.

MOORE, J. An assessment for personal property was made against the relator of $6,936,584.87. Upon application to the circuit court this amount was reduced to $2,055.05. This action of the circuit judge is sought to be reviewed by the writ of *certiorari*.

The facts are not in dispute. The December, 1902, report of the relator to the commissioner of insurance showed its gross assets to be $7,777,714.86. When its liabilities are deducted, its surplus is $404,269.90. The real estate was shown to be valued at $402,214.85, which, deducted from its net assets, left $2,055.05, which amount the court below found to be the amount of the personal property which should be assessed against the company. It is the claim of the respondents that relator should be assessed for personal property to the full amount of its

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gross assets, less the value of its real estate. It is claimed subdivision 5 of section 3832, 1 Comp. Laws, should apply as to exemptions, and that the reserve fund of the company does not represent a debt due or to become due, within the meaning of the statute, which may be deducted from the assets, but represents a contingent liability only; citing the recent case of *Detroit Fire & Marine Ins. Co.* v. *Hartz*, 132 Mich. 518 (94 N. W. 7). We will refer to that case later. It is the claim of relator that, even if subdivision 5 of section 3832 is to control this assessment, the reserve fund represents debts which should be exempt from taxation. The following cases would seem to sustain that contention.

In discussing the question of whether the reserve fund of a life-insurance company should be exempt from taxation under a general law applying to all taxpayers, the court in *Alabama Gold Life-Ins. Co.* v. *Lott*, 54 Ala. 499, used the following language:

"To contract obligations that shall be discharged in money, payable upon the happening of the death of those whose lives are insured, or other designated future events, in consideration of premiums to be in the meantime periodically paid to the companies, is the proper and especial business of life-insurance associations. Their success and prosperity, when honestly and prudently managed, are measured by the number and amount of such obligations created by the policies they issue. To be indebted is, therefore, their normal condition, a condition necessary to their healthful vitality, while their actual wealth at any time consists only of the surplus of their assets (composed almost entirely of credits) over and above their indebtment at the same time.

"Of course, the indebtment of such a company is not identical with the aggregate of all the sums for which its policies are issued; for, while these are running to maturity, they bring into the company a stream of the premiums in consideration of which they were issued, and which, being added to those that have previously flowed in, constitute the supply out of which the company discharges the frequent demands arising out of the expiring policies, and the dividends that may be due to stockholders, as well as

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its current expenses. This supply should always exceed the amount of estimated present indebtment at any time, the proper provision for which is supposed to be the fund known as 'the premium reserve,' which, however, may be embraced in and be a part of the general assets of the company. The amount of this fund depends upon the amount of the policies outstanding, payable in the future, generally soon after the death of persons on whose lives they are given, and is determined by men skilled as actuaries, who ascertain, according to certain rules or methods of computation, what is at any time the present value of all such outstanding policies, or (what is equivalent thereto) the sum that is required to safely reinsure them; and this sum or value, representing what all the policies are worth at the particular time, or what other insurance companies would charge for taking the same risks, is the measure of the company's indebtedness at that time to its policy holders, and is habitually set down in the annual or other periodical statements required in many of the States by law to be made of the assets and liabilities of life-insurance companies, as an item, and the principal item, of present indebtedness. The amount of the liabilities upon all the outstanding policies is, of course, many times greater; and by an unusual mortality in a particular year the losses of a company might amount, and its indebtedness be increased, to a larger sum than its estimated 'reserved fund.' But this fund is doubtless generally adequate, and the method of ascertaining it is probably as accurate as any that can be devised under the direction of a court, or be used by a company desirous to do right, of determining the amount of its present indebtedness at any particular time. * * *

"A life-insurance company, therefore, when its solvent credits are assessed for taxation under a statute which declares that from them 'the indebtedness of the taxpayer shall be deducted, and that the excess only shall be taxed,' ought to be allowed to have deducted therefrom its 'premium reserve.' Unless this be done, an invidious discrimination will be made against institutions which it cannot be supposed the legislature intended to tax out of existence."

The same question was presented to the supreme court of Iowa in *Equitable Life-Ins. Co.* v. *Board of Equalization*. The court at first held according to the contention of the respondents here. A rehearing was ordered

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(74 Iowa, 178 [37 N. W. 141]), and, after very elaborate arguments, the court held that the reserve fund of the company represented its indebtedness to its policy holders, and should be exempt from taxation; quoting with approval the case of *Alabama Gold Life-Ins. Co.* v. *Lott*, *supra*. This case was again followed in *Hawkeye Ins. Co.* v. *Board of Equalization*, 75 Iowa, 770 (37 N. W. 966).

The legislature of this State recognizes the fact that a premium paid to a life-insurance company does more than simply pay for a period of time equal to the interval between the payments. Section 7206, 2 Comp. Laws, provides that, after the third payment has been made, a policy shall not be forfeited for nonpayment of premium, and provides a method of ascertaining its net value. As every policy holder must at some time die, if any promise based on a past consideration to pay a sum of money on an event sure to happen constitutes a debt, it is very clear that, upon the great bulk of the policies issued to the holders thereof by this company, there is an indebtedness which is sure to mature. The legislature has recognized this condition of affairs, and requires the officers of each life-insurance company annually to make a detailed statement of its affairs. Section 7200, 2 Comp. Laws. Section 7207 requires a valuation of all the outstanding policies to be made, and prohibits any company from doing business in the State unless its assets shall equal the net value of its outstanding obligations, and provides in detail how this shall be determined. It clearly recognizes that, to arrive at the net assets of the company, it is necessary to deduct from its gross assets its liabilities; and it is equally clear that the property owned by an insurance company cannot be said to be more than the difference between these two sums.

But, whatever may be said as to whether this exemption should be made under the terms of the general tax law, the legislature has not left the method of assessing the personal property of life-insurance companies in doubt.

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Section 3834, 1 Comp Laws provides just how it shall be done. That statute was onstrued in a former case between the parties to this record which case is reported in 129 Mich. 104 (88 N W 405). The case was so recently decided it is not necessary to do more than refer to it. It is said, however, by counsel for respondents, that but one question was presented in that case, to wit, the constitutionality of that part of section 3834, 1 Comp. Laws, which authorized the insurance commissioner to determine the amount of the personal property for which the company should be assessed. It is true the unconstitutionality of the law was the principal question as presented by counsel; but the answer interposed averred, among other things, "that the liabilities of life-insurance companies are contingent liabilities, and are conditioned upon the continuation of the payment of premiums by said policy holders to said companies." In the brief of counsel it was urged as a reason why the law was invalid: "Because the statute fixes an arbitrary rule for the determination of the liabilities of insurance companies, which ignores the fact that insurance contracts are of various classes, to wit, straight life, term, paid-up, annuity, etc.; that certain contracts are forfeitable; that others are nonforfeitable; that others have a fixed surrender value; that all are contingent, and not absolute, liabilities." After the decision was rendered, an application was made for a rehearing, which was denied. In the brief of counsel it was again urged: "Our contention is that the obligations arising under insurance policies are contingent liabilities; * * * that the aim of the statute is to offset against credits the unqualified obligations owing by the person taxed, which decrease his taxable property in fact." So we had before us, involved in the question as then presented, the same claim which is made by counsel now. If the law is constitutional, as we held in that case, it is decisive of this case.

It is said that this case was overruled in *Detroit Fire & Marine Ins. Co.* v. *Hartz*, 132 Mich. 518 (94 N. W. 7).

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The court did not understand it was overruling it, but, on the contrary, cited it with approval. In that case the relator sought to go behind the determination of the commissioner, and asked to have deducted from the net assets, as determined and reported by the commissioner, an item of bonds, which presumably represented a portion of the investment to meet liabilities which were determined to be such by the commissioner. The statute was sustained, following the case of *Michigan Mut. Life-Ins. Co.* v. *Hartz*, 129 Mich. 104 (88 N. W. 405). It was also said that the writ could not issue in any event, because, if that law could not be sustained, and therefore the federal bonds included in the assets should have been deducted by the assessor, he would also be obliged to deduct from the liabilities the reserve fund (*i. e.*, unearned premiums), which could not be called a *bona fide* indebtedness under the general law, which would then apply. This does not militate against the relator's contention in this case.

The order of the circuit court is affirmed.

The other Justices concurred.

FREUD *v.* DETROIT & PONTIAC RAILWAY CO.

CANDLER *v.* SAME.

1. STREET RAILWAYS—ENCROACHMENTS ON PRIVATE PROPERTY—INJUNCTION.

   A corporation operating a suburban electric railway has no right, upon the refusal of an abutting owner to sell a strip of land desired by it, to enter thereon, without any attempt to exercise the power of eminent domain, cut shade trees, grade the property, and construct its track; and equity will enjoin it from so doing.

2. SAME—LOCATION OF TRACKS—AUTHORITY OF TOWNSHIP BOARD.

   The provision of 2 Comp. Laws, § 4097, relating to the improve-

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ment of the public highways, that no earth shall be dug, plowed, or scraped nearer than eight feet of the margin of the highway without the consent of the abutting owner, does not limit the power of the township board under section 6446, so as to prevent it from authorizing the construction of a street railway within eight feet of the highway line. MOORE and MONTGOMERY, JJ., dissenting.

Appeals from Oakland; Smith, J. Submitted November 19, 1902. (Docket Nos. 106, 107.) Decided June 23, 1903.

Bills by Leopold Freud and by Homer W. Candler and others to enjoin the Detroit & Pontiac Railway Company from constructing its track on complainants' lands. From decrees dismissing the bills, complainants appeal. Reversed.

Keena & Lightner (*John H. Patterson*, of counsel), for complainants.

James H. Lynch (*Fred A. Baker*, of counsel), for defendant.

MOORE, J. This is an appeal from a decree dismissing injunction bills. The circuit judge was of the opinion that complainants had a remedy at law. The following statement of facts, which is fully justified by the record, is taken from the brief of the solicitors for complainants:

"The two cases in the above title were heard together. The circuit judge filed one opinion in the two cases. Separate decrees were entered, and appeals taken. Except for the description of the property, the amended bill of complaint in the Freud case is substantially identical with the bill of complaint in the Candler case, and the answers of defendant are substantially identical.

"The complainant Freud, in the one case, and the complainants Candler Bros., in the other case, are owners of separate parcels of land fronting on the west side of the Detroit & Birmingham Plank Road, which is a continuation of Woodward avenue, in Detroit. The Candler property includes a little less than 20 acres, and was bought by

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them from Mary Granger in 1892 or 1893. It is situated a short distance northerly of the boundary between the counties of Wayne and Oakland, and it has a frontage on Woodward avenue, so called, of about 924 feet. The Freud property adjoins the Candler place immediately on the north. It includes about 29 acres, and was purchased by Mr. Freud in 1893. It has a frontage of about 750 feet on Woodward avenue. The highway was originally the Saginaw Turnpike, and its location and width were established by the legislature. Act No. 107, Sess. Laws 1857. The width of the road was to be four rods,—two rods on each side of the center of the then existing plank road.

"As early as 1867, the Granger families owned and occupied both the Freud and Candler properties. In that year they improved both places, and before the year 1870 there had been planted along the front line of both properties shade trees, outside of which had been built a fence marking the line of the highway as to both properties. Within the fence on the Candler place, and not far from the house, was sunk a well, which remained until it was destroyed by defendant, in May, 1900. * * * Along the front of complainants' property, the highway (that is, the space between the fences on either side) was nearly, if not quite, 66 feet in width; the graveled part of the plank road being about in the center of the highway as thus defined. The line of the fences was not in all places on a straight line, and the graveled road meandered slightly, but their lines were substantially as above stated.

"In January, 1895, the township of Royal Oak, in which all of the property mentioned is situated, gave a franchise for the construction of an electric street railway along Woodward and other thoroughfares to George Hendrie, Fred A. Baker, Stephen Baldwin, John C. Donnelly, and Strathearn Hendrie. On October 21, 1895, the Detroit & Birmingham Plank-Road Company granted permission to the Oakland Railway Company to occupy the highway for the construction of a single-track electric railway along Woodward avenue, under conditions set forth in the contract. In pursuance of these contracts, the Oakland Railway Company, during the years 1895 and 1896, constructed a single-track electric railway from Detroit to Birmingham and Pontiac; the track being laid in the highway on Woodward avenue between the traveled part of the plank road and the fences which had marked the line of the complainants' two properties for many

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years. In the construction of this single track, and the operation of it, none of the trees were removed from the front of either of the properties, nor were the fences disturbed, unless possibly at the upper end of Freud's land the fence which had stood outside of the trees was then placed immediately to the west, and behind the trees; also some of the trees at the upper end of Mr. Freud's property had some of their limbs cut off by the railway company, so as not to interfere with the poles and wires used in the construction and operation of the plant.

"On March 21, 1899, the Oakland Railway Company secured the privilege from the Detroit & Birmingham Plank-Road Company for the construction of a double-track where previously it had maintained only a single-track railway. Previous thereto, the railway company had purchased from Mr. Porter, who adjoined complainants on the north, a strip of land one rod wide along the front of his property, and immediately north of Freud's land. During 1899 the railway company constructed a double-track railway from Royal Oak southerly to the northerly line of Freud's property; building the tracks in such a way as to protect the line of trees which had previously marked the front of Mr. Porter's land.

"The defendant, the Detroit & Pontiac Railway Company, succeeded to any rights which the Oakland Railway Company had in the railway, in 1897 or 1898. Previous to May 1, 1900, at which time defendant began the destruction of the trees in front of both properties, and the removal of the fences thereon, no request for permission to appropriate their property and no negotiations of any kind were had by defendant, or by any one on its behalf, with any of the Candlers. As to Mr. Freud's property, there had likewise been no negotiations of any kind, except with a Mr. Springsteen, who, claiming to represent defendant, saw Mr. Freud, and made an offer to pay him for the privilege of constructing the double track. Mr. Freud refused to sell his property for the amount which Springsteen proposed, viz., $1,000, and told him he preferred to have the railway laid in the center of the road; Mr. Springsteen having suggested that Mr. Hendrie owned a controlling interest in the graveled road, and could do so.

"Without further warning, defendant's men, under the personal instruction of its manager, entered upon the complainants' properties with a large force of men; moved the fences back a distance of substantially seven feet along

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the line of both properties; cut down all of the trees, which had stood along this line for 30 years or thereabouts; filled in the well on the Candler property; graded the entire front, utterly regardless of the slope of the land on the adjoining properties, or of the grade of the plank road; and constructed upon this property a double-track railway, built substantially as commercial railways are constructed, placing trolley poles immediately against the fence in its new location, and having the ties and the rails of the inner track, throughout a large part, if not all, of the length of the properties, on the land which had previously been included within the fences of complainants.

"Complainant Freud immediately applied to the Oakland circuit court for an injunction restraining these trespasses; his original bill being filed on May 2, 1900. The circuit judge refused to grant an *ex parte* injunction, except to restrain the defendant from cutting trees. As the trees had already been cut down, the injunction was of no use whatever to complainant. Upon a hearing after notice, the circuit judge refused to grant any preliminary injunction. Since defendant continued its trespasses, and was apparently appropriating complainants' land by building its railway in defiance of complainants' rights, complainants, on May 10, 1900, served written notice upon defendant that they intended severally to prosecute their suits to a conclusion, that defendant should cease its trespasses, and that any expense incurred by defendant in placing its track as proposed would be done at defendant's risk. On May 7, 1900, Mr. Freud filed his amended bill of complaint, and the Candlers at the same time filed their original bill of complaint. Before answer in either cause, and on May 16, 1900, amendments were filed, setting forth further objections to defendant's appropriation of complainants' property. The defendant answered the bill in each case. The defendant continued the construction of its railway, and at the time of the hearing, in the fall of 1901, it had constructed a double electric-railway track along and upon the front of these properties."

The action of defendant is wholly outside the law. The complainants moved promptly, and attempted to prevent the unlawful cutting down of the trees and the encroachment made upon their properties. If the defendant may forcibly take possession of a strip of land seven feet wide belonging to complainants, because it thinks it needs it, it

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has the right to take any quantity of their land. If the defendant is organized under a law which authorizes it to exercise the right of eminent domain, if it could not agree with the owners of the land, it was its duty to do so before entering upon the land. If it is not authorized to invoke the law of eminent domain, and cannot agree with complainants upon a purchase of the land, it was not justified in taking it by force. It does not, by reason of being a corporation, occupy any different relation than an individual in that respect. The principles involved are so fully discussed, and the authorities collected, in recent cases decided by this court, that we deem it unnecessary to more than call attention to them. *Nichols* v. *Railway Co.*, 87 Mich. 361 (49 N. W. 538, 16 L. R. A. 371); *Kennedy* v. *Railway*, 108 Mich. 390 (66 N. W. 495); *Stock* v. *Township of Jefferson*, 114 Mich. 357 (72 N. W. 132, 38 L. R. A. 355); *Donovan* v. *Allert*, 11 N. Dak. 289 (91 N. W. 441, 58 L. R. A. 775).

An important question presented by the record is whether defendant has any right to maintain any part of its track within eight feet of the line of the highway in front of the property of complainants. Section 4097, 2 Comp. Laws, provides, among other things, as follows:

"*Provided*, that no earth shall be dug, plowed, or scraped nearer than within eight feet of the margin of the highway, without the consent of the owner of the premises adjacent thereto."

This law was passed in 1885. Act No. 160, Pub. Acts 1885. It is claimed by defendant that it was passed at a time when electric roads were unknown; that, as a rule, they cannot be constructed without encroaching upon the prohibited space; and that the uses to which highways are now put are contrary to the spirit of the statute, and it should not be enforced. If counsel are right, their argument is one which should be addressed to the legislature, rather than the judicial branch of the government.

It is also claimed the law of 1885 is amended, by implication, by the statute whose provisions are contained

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in sections 6470, 6471, 2 Comp. Laws. This statute undertakes to confer upon electric roads a method of acquiring the right to use a portion of the highways controlled by plank-road companies; but it is expressly provided therein "that the provisions of this act shall not be so construed as to affect the rights of abutting property owners or the rights of the public in such highways." We think it clear the legislature did not intend by this statute to amend the law of 1885, and that the railway company had no right to construct any portion of its road nearer than eight feet of the street line without the consent of the abutting proprietor.

It is suggested that as the limitation to the removal of earth within eight feet of the margin of the highway is found in a chapter headed, "The Performance of Labor on Highways, and the Commutation Therefor," the provision is a mere limitation on the right of the overseer of highways to enter upon the eight-foot strip in building or improving the public highway, and that it does not limit the power of the township board to grant this right to a street-railway company. Section 1, art. 11, of the State Constitution, provides for the election of commissioners of highways and overseers of highways, whose powers and duties shall be prescribed by law. We cannot see any more appropriate place, when laws are to be enacted relating to the use of highways, and the character of the improvements thereon, than to place these provisions in the chapter the heading of which has been quoted. When the legislature undertook to confer upon the township board the right to grant to a street-railway company the right to run its road in and along the highways of the township, in the absence of anything to indicate to the contrary, it may safely be presumed the legislature had in mind the limitations and provisos in the statute which had been placed there in the interest of the owner of the land, and did not intend to do away with them, and, by the use of the term "highway," referred to such a highway as the laws of the State provided for.

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What we have said as to the power conferred by the legislature upon the township board will apply equally to plank-road companies. The needs of such a company are simply for such a portion of the highway as will provide for a roadbed 16 feet wide. The highway continues to be a public highway, though a corporation is authorized to make a plank or gravel road thereon and charge toll. Should the term of the charter end, or it become forfeited, the highway would become at once a normal highway. There is nothing in the needs of the plank road, or in the statute authorizing its construction, which indicates the legislature did not intend the proviso in relation to the eight-foot strip to apply to highways of this character.

The decree of the court below should be reversed, and one entered here perpetually enjoining the defendant from trespassing on the property of complainants, and requiring it to remove all portions of its track and ties eight feet easterly of where the highway fence was before it was removed. The case should also be remanded for the purpose of enabling proofs to be taken for the purpose of ascertaining how much damage has been sustained by complainants, after said railway track has been removed as above required, by reason of the unlawful acts of defendant. The complainants should recover costs of both courts.

MONTGOMERY, J., concurred with MOORE, J.

CARPENTER, J. We fully concur in the opinion of our Brother MOORE that complainants are entitled to an injunction compelling defendant to remove its track, and that they are entitled to compensation for the damage done them. We cannot, however, assent to the proposition that the provision of section 4097, 2 Comp. Laws, quoted in said opinion, prohibits the construction of a street railway within eight feet of the margin of the highway. That provision is found in the chapter headed, "The Performance of Labor on Highways, and the Com-

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mutation Therefor." The section in which it is found (viz., section 4097, 2 Comp. Laws) reads:

"All road work hereafter done upon roads that have been opened and worked for ten years or more, except such as may be required for necessary repairs, shall have in view the permanent improvement of such roads by graveling and turnpiking. Elevations upon the line of such roads shall be cut down, and the depressions raised, in order to form a grade as level as the nature of the ground will permit. Any surplus earth or gravel, taken from one portion of the road, may, with the consent of the highway commissioner, be used to fill such depressions in any other road in the same district: *Provided*, that no earth shall be dug, plowed, or scraped nearer than within eight feet of the margin of the highway, without the consent of the owner of the premises adjacent thereto. Such roads shall be worked so as to form a turnpike sufficiently crowning to turn the water, with gutters adequate for drainage, and the width of the turnpike shall be not less than ten feet on each side of the center line of the road, terminating in the center of the gutter. Any person may, under the direction of the overseer of highways, be allowed to remove snow from the traveled highway, to haul gravel or other material for the repair of roads, at any time during the year, and a receipt for the work so done shall apply on his next assessment of highway labor."

It seems to follow that the proviso in question is a mere limitation on the right of the overseer of highways to enter upon this eight-foot strip in building or improving the public highway. The overseer of highways is not given the power to determine the location in a highway of the tracks of a street-railway company. The township board, by virtue of section 6446, 2 Comp. Laws, would seem to have that power. See *Nieman* v. *Railway Co.*, 103 Mich. 256 (61 N. W. 519); *Township of Springwells* v. *Railway*, 122 Mich. 486 (81 N. W. 336). We think it clear that this power of the township board is not limited by a statute which applies only to the overseer of highways in building or improving the highway. We do not think this court can determine whether the track of the street-railway company should or should not be located

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on the eight-foot strip in question. We do think that we have no power to say that it should not be located there, if the township board determines that it should.

The decree should be as suggested in the opinion of Justice MOORE, except that it should not require defendant to remove its track and ties eight feet easterly of where the highway fence was before it was removed.

HOOKER, C. J., and GRANT, J., concurred with CARPENTER, J.

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BRADY *v.* KLEIN.

1. LANDLORD AND TENANT — DEFECTIVE PREMISES — PERSONAL INJURIES—COVENANT TO REPAIR—LIABILITY OF LANDLORD.
   A landlord is not liable to a licensee of his tenant, injured through the defective condition of the premises, by reason of the nonperformance of a covenant to repair.

2. SAME—NUISANCE.
   One who lets premises in a defective condition is not liable to a stranger injured by the defect, unless it amounts to a public nuisance.

3. SAME.
   Thus: A landlord of a dwelling is not liable to his tenant's child for injuries received by stepping into a hole in a door-sill, though he had agreed with the tenant to repair the defect.

Error to Wayne; Donovan, J. Submitted January 9, 1903. (Docket No. 20.) Decided June 23, 1903.

Case by Thomas B. Brady, by next friend, against Sevilla Klein, for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

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Frederic T. Harward and *Delbert J. Hinkley*, for appellant.

George Gartner, for appellee.

HOOKER, C. J. The plaintiff is a young man about 20 years old, and this action is brought by his mother and next friend to recover damages occasioned by an injury received through the alleged negligence of the defendant when he was under three years of age.

The mother is the only witness by whom the injury and alleged negligence were proved. She stated upon the trial that she had negotiations with the defendant in regard to renting a dwelling, and was allowed to look at the house. She returned and told defendant that it was all right, except that the sill of the door to the summer kitchen was rotted away, leaving a hole, and that, upon the defendant's promise to fix it, she rented the house and paid a month's rent. Two or three weeks after, the plaintiff stepped into the hole and received a permanent injury. She admits that she paid the rent for two or three months, and then failed to do so, and that she did not say anything to the defendant about the injury to the child until she called for her rent and told her to vacate the house. She never mentioned it again. The defendant is an old lady of over 80 years of age. She testified that she heard of the accident from plaintiff's mother about the time it happened, and was told by her that the boy was hurt by a fall in the yard; that she never heard of this claim until the action was begun, a few months before she testified. The learned circuit judge directed a verdict for the defendant, and plaintiff has taken a writ of error.

The plaintiff's claim is said to rest upon two rules, either of which is supposed to be sufficient to entitle him to a recovery:

1. That, when a landlord has covenanted to repair, a licensee of the tenant, injured through the defective condition of the premises, has a right of action against the tenant, who in turn may recover against the landlord upon

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his covenant, and that, to avoid circuity of action, he may sue and recover against the landlord.

2. That, when one lets a tenement in a defective condition, he is liable to a stranger who is injured.

So far as the authorities cited by counsel show, the first proposition was first enunciated in the case of *Payne* v. *Rogers*, 2 H. Bl. 349. This injury was caused by plaintiff's falling through a hole in a foot pavement, and we may therefore infer that the defect was a public nuisance, and, under many cases, actionable, in favor of any one injured, against the person whose negligence permitted it to remain. What was then said about avoiding circuity of action was unnecessary in that view of the case, and the case has been questioned by subsequent English cases. See *Russell* v. *Shenton*, 3 Q. B. (N. S.) 449; *Todd* v. *Flight*, 9 C. B. (N. S.) 377; *Ingwersen* v. *Rankin*, 47 N. J. Law, 18 (54 Am. Rep. 109); *Phillips* v. *Library Co.*, 55 N. J. Law, 307 (27 Atl. 478); *Clyne* v. *Helmes*, 61 N. J. Law, 366 (39 Atl. 767). See, also, *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658. *Nelson* v. *Brewery Co.*, L. R. 2 C. P. Div. 313, was a similar case, where a guest in the yard of an inn was injured by the fall of a chimney which the landlord had agreed to repair. He was permitted to recover against the landlord, but it was not upon the ground of a promise, but because of his neglect in permitting the existence of a public nuisance. The case of *City of Lowell* v. *Spaulding*, 4 Cush. 277 (50 Am. Dec. 775), is similar. There one fell through a walk, and recovered against the city, and it sued the owner of the premises, who was held responsible for the existence of a public nuisance. There is an allusion to *Payne* v. *Rogers*, but it was unnecessary. *Sontag* v. *O'Hare*, 73 Ill. App. 432, allowed a recovery by an administrator for injury by deceased's falling from a porch through a defective railing. The only question pressed in the case was that the evidence failed to show that the injuries caused the death, though it is said in the opinion that the landlord's promise to deceased's husband

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to keep the premises in repair would make him liable if the injuries caused her death; citing *Mendel* v. *Fink*, 8 Ill. App. 378; *Platt* v. *Farney*, 16 Ill. App. 216. We think these cases hardly justify the statement. The case of *Clancy* v. *Byrne*, 56 N. Y. 129 (15 Am. Rep. 391), was an injury from a defect in a pier leased by the defendant, which was devoted to use by the general public, much as is an inn. Clearly it was a case of public nuisance. Our own case of *Fisher* v. *Thirkell*, 21 Mich. 14 (4 Am. Rep. 422), was the case of a scuttle in the sidewalk of a public street. The discussion in that case shows that a liability, had one been found, would have rested on negligence, *i. e.*, nonperformance of a duty to the plaintiff, and not upon a contract to repair, though in many of the cases the contract to repair is essential to create the duty, which would otherwise rest solely upon the tenant.

In support of the second proposition, the plaintiff's counsel cite, among other cases, *Swords* v. *Edgar*, 59 N. Y. 28 (17 Am. Rep. 295). There it was held that one who owned a public pier, and rented it with a public nuisance upon it, was liable to a third person who was afterwards injured, although the tenant was bound to keep it in repair. Three judges dissented. The case of *Owings* v. *Jones*, 9 Md. 108, sustains the same rule as to a public nuisance. *Albert* v. *State*, 66 Md. 325 (7 Atl. 697, 59 Am. Rep. 159), also involved a public nuisance. The discussion in the opinion shows that the rule is limited to cases of public nuisance. The case of *Willcox* v. *Hines*, 100 Tenn. 538 (46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770), rests on another rule, viz., the liability of one to his tenant for letting premises with concealed dangers. This line of cases has no application in this case. The cases of *Stillwell's Adm'r* v. *Land Co.*, (Ky.) 58 S. W. 696, 52 L. R. A. 325, and *Moore* v. *Steljes*, 69 Fed. 519, more nearly support the plaintiff's claim.

Upon the other hand, when the accident arises from a defect known by the tenant, and one which is not a nuis-

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ance, the remedy against the landlord is upon his covenant, and must be brought by the tenant, as there is no privity between the landlord and a third party, nor does he owe him any duty. It is otherwise in case of a nuisance which the landlord should abate, for there the landlord owes the duty of care, and is liable for his negligence to all to whom he owes such duty. *Samuelson* v. *Mining Co.*, 49 Mich. 164 (13 N. W. 499, 43 Am. Rep. 456); *O'Leary* v. *Delaney*, 63 Me. 585; *Dalay* v. *Savage*, 145 Mass. 38 (12 N. E. 841, 1 Am. St. Rep. 429); *Tuttle* v. *Manufacturing Co.*, 145 Mass. 175 (13 N. E. 465); *Quay* v. *Lucas*, 25 Mo. App. 7; *Burdick* v. *Cheadle*, 26 Ohio St. 393 (20 Am. Rep. 767); 2 Wood, Land. & T. p. 1288; *Sterger* v. *Van Sicklen*, 132 N. Y. 499 (30 N. E. 987. 16 L. R. A. 640, 28 Am. St. Rep. 594); *Clyne* v. *Helmes*, 61 N. J. Law, 359 (39 Atl. 767); *Fowles* v. *Briggs*, 116 Mich. 425 (74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537). In these cases the distinctions are fully discussed, and need not be repeated here. Most of the cases upon which plaintiff relies are not inconsistent with them. The statement that a landlord is liable to a third person, when he has promised to repair, is made, in a general way, in some of the text-books, but will be found to be qualified in most cases, and when it is unqualified is clearly at variance with authority.

The judgment is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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ALLINGTON & CURTIS MANUFACTURING CO. v. DETROIT REDUCTION CO.

1. SALE—CONSTRUCTION OF CONTRACT—"MANUFACTURED STATE."
Under a contract for the sale of dust collectors for ore pulverizers, providing that the apparatus should be shipped in "manufactured state," a failure to rivet the joints of the pipes before shipping was not a breach, where it appeared that the seller followed its usual practice in that respect.

2. TRIAL—CROSS-EXAMINATION—STATEMENTS OF COUNSEL.
On the cross examination of a witness called by defendant as an expert on the manufacture and shipping of sheet iron, the witness testified that he had had experience in a certain manufacturing institution; and, on objection to a question as to what had become of that institution, counsel stated in the presence of the jury that, to test witness' expert knowledge, he proposed to show that the company was wrecked by his mismanagement, that two other companies were similarly wrecked, and that every other institution with which he had ever been connected had been ruined. The objection to the question was sustained. *Held*, that such statement was not sufficient cause for reversing a judgment for plaintiff.

3. SALE—BREACH OF WARRANTY—INSTRUCTIONS.
In an action for the purchase price of dust collectors for ore pulverizers, warranted both to convey and separate ore, an instruction that, if the machine failed to do both, there was a breach of the warranty, was not objectionable as requiring a failure both to convey and separate in order to constitute a breach.

4. SAME.
In an action for the purchase price of a machine, an instruction basing the right to recover on whether the machine could, under proper management, have been made to do the work contemplated, sufficiently covered defendant's claim that the machine was "impractical, and mechanically impossible" of successful operation.

5. SAME.
In an action for the price of a machine, in which the buyer claimed a breach of a warranty that the machine would do certain work, an instruction whereby the case was made to

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turn on whether or not the machine had done the work, regardless of whether it would under proper management, was properly refused.

6. SAME.

In an action for the price of dust collectors for ore pulverizers, in which it appeared that the seller had warranted the collectors to take the ore out of the pulverizers, an instruction that there was a breach of the warranty if plaintiff's agent had certain knowledge at the time the contract was made, and contemplated the delivery of the ore by the pulverizers to the collectors, was properly refused.

7. TRIAL—EVIDENCE—HARMLESS ERROR.

The admission of testimony in support of a claim which the court afterwards ruled against in the charge was harmless.

8. SAME—INSTRUCTIONS.

The submission to the jury of an undisputed item of charge is not prejudicial, where the verdict shows that they allowed it.

9. CORPORATIONS — DIRECTORS — EVIDENCE — ADMISSIONS — RES GESTÆ.

In an action for the price of a machine sold to a corporation, in which defendant claimed a breach of warranty as to the work the machine was capable of doing, admissions by a director of defendant corporation as to the manner in which the machine was operating, not made in connection with the performance of any duty devolving upon him, were not binding on the corporation, though it appeared that he was present, giving directions, at the installation of the machinery, and was authorized to make some arrangement as to settlement therefor.

10. SALE—BREACH OF CONTRACT—DAMAGES.

Defendant in an action for the price of a machine, having set up the claim that plaintiff's agent, after repeated attempts to make the machine do the work guaranteed, "gave it up as a bad job," and went away, could not complain that he was not permitted to recoup the cost of subsequent efforts made by himself in the same direction.

Error to Wayne; Hosmer, J. Submitted January 15, 1903. (Docket No. 45.) Decided June 23, 1903.

Assumpsit by the Allington & Curtis Manufacturing Company against the Detroit Reduction Company for

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goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

John W. Beaumont and *Bayard T. Brown*, for appellant.

Humphrey & Grant, for appellee.

HOOKER, C. J. The plaintiff contracted with the defendant to manufacture and deliver certain machinery for collecting the product from its ore pulverizers in use at Cripple Creek, or, to state it more accurately in the language of the contract:

"The contractor is to furnish all of the sheet-metal material and iron hangers for pipes, dust collectors, centrifugal traps, grading chambers, valves, and fans, *in manufactured state*, for two complete dust-collecting systems, to be connected to your two pulverizers. The systems to be of the return type, which is practically dustless, and to be substantially like pencil sketch submitted for approval. All of the material, except the fans, is sold f. o. b. cars Saginaw, Mich., and the fans, which are to be No. 10 Sturtevant Monogram pattern, are furnished f. o. b. cars Boston. All of the sheet-steel work is to be of No. 16 gauge galvanized steel, except the first joints in the delivery from the pulverizers, which is to be 12 gauge. The contractors are to furnish a mechanic to superintend and help install the plant, and all other labor is to be furnished by the purchaser.

"The contractor is to design the working drawings for constructing and installing the system, and guarantees that each plant will convey all of the material pulverized to a fineness of 100 mesh and finer, and catch the greater bulk of the same in the centrifugal trap interposed between the pulverizer and the fan, thus saving wear and tear on the fan. The contractor further guarantees that the greater portion of the remainder of the material which passes through the fan will be caught in the dust collector, from which the air is finally returned to the pulverizer. A small portion of the volume of air will be allowed to escape from the dust collector to a small supplemental collector, to compensate for a small amount of fresh air continually taken into the pulverizer.

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"Each pipe leading from the delivery of the pulverizers is to be supplied with an enlarged grading chamber, which is to be adjustable so as to prevent particles coarser than 100 mesh from passing through and into the pipe system.

"The purchaser is to prepare return openings 12″ in diameter or an equivalent. On each side of each pulverizer the return pipes for the air are to be attached to these openings. The purchaser is to drive the fans to the required speed for handling the material, and pay the contractor eighteen hundred dollars for the fans and material furnished f. o. b. cars Boston and Saginaw, and pay the railroad fare, board, and $4.00 per day for mechanic's time. The contractor is to furnish material for soldering, riveting, etc., and the purchaser is to furnish scaffolding and permanent supports for heavy parts. Payments are to be made to the contractor as follows: One-third on delivery of material, one-third when system is installed, and one-third thirty days after installation. Shipment to be made within two weeks."

At the time this contract was negotiated, blue prints of defendant's pulverizers were furnished to the plaintiff. The apparatus was duly received at Cripple Creek, and set up under the supervision of plaintiff's expert. According to the defendant's claim, repeated experiments, both by the expert while there and by defendant after his departure, failed to make the apparatus do the work as guaranteed. Being sued for the contract price, the defendant set up the warranties, and sought to recoup damages for a failure to perform the contract. A verdict was rendered for the plaintiff, and defendant has appealed.

The defendant was in the possession of two ore pulverizers when it made its contract, as the contract shows. It sought to have the product of the pulverizers conveyed from them, and to that end the parties made the contract. The alleged warranties were: "(1) that each plant will convey all of the material pulverized to a fineness of 100 mesh and finer;" (2) that it will "catch the greater bulk of the same in the centrifugal trap interposed between the pulverizer and the fan, thus saving wear and tear on the fan;" (3) that "each pipe leading from the delivery of the

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pulverizers is to be supplied with an enlarged grading chamber, which is to be adjustable *so as to prevent particles coarser than 100 mesh* from passing through and into the pipe system." It also provided that "the contractor is to furnish all of the sheet-metal material and iron hangers for pipes, dust collectors, centrifugal traps, grading chambers, valves, and fans, in manufactured state, for two complete dust-collecting systems, to be connected to your two pulverizers," as already stated.

The apparatus was shipped to, and arrived at, Independence, Colo. The defendant asserts that it was not shipped in a manufactured state, for the reason that the joints of pipe were not riveted together, and complains of the charge, in which the jury were told that the contract was complied with in that particular. The testimony of the plaintiff showed that it followed the usual practice of its factory in this respect, and, this being uncontradicted, we think the judge committed no error in his charge. He might have said to the jury that the contract contemplated the "manufactured condition" adopted by the plaintiff in its business. There was no testimony showing that such pipes were shipped by other factories in any other condition, if it would have been pertinent.

One of defendant's witnesses testified that he had experience as a manufacturer of sheet iron, and it was the uniform custom to ship smokestacks in car lengths, joints being riveted. On cross-examination, counsel drew from him that he had experience in the manufacture of sheet iron in a Michigan institution. He was asked what had become of the institution, and, upon objection being made, counsel stated to the court, in the presence of the jury:

"In connection with this, I offer to show by the cross-examination of this witness, who is testifying as an expert on this business, as he has testified, that he was the purchasing and the selling agent of that company. I propose to show that that company was wrecked by his management, and became insolvent; that the Lansing Lumber Company and the Capitol Lumber Company were wrecked by

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him; and that every institution with which he has become connected since he was in business has been wrecked and ruined,—for the purpose of testing his expert knowledge in any or all business."

The court sustained the objection. We think this statement not a sufficient cause for reversing the judgment.

Defendant's counsel claim that the court erred in his charge upon the subject of the warranties. It is truly said that a failure to install machinery which should both convey and separate the grades of ore would be a breach of the warranty, and, if the instruction was that a failure to both convey and separate was essential to a breach, it was error. In our opinion, however, the charge is not open to such a construction, for it clearly states that a failure to do both was a breach of the warranty. It is clear that a failure to do one is a failure to do both, in the sense meant, and doubtless understood.

It is also said that the court erred, inasmuch as he failed to present the defendant's theory and allow the jury to pass upon it. This theory appears to have been that it was mechanically impossible that the machine should do the work contracted. It is claimed that the evidence showed this; *i. e.*, there was evidence that it never did it. And it is claimed that it was shown that it was not so constructed as to be capable to do so, that it was an experiment, and that it was not designed to take ore out of the pulverizers, but only to convey it after being delivered by them. On the other hand, there was testimony tending to show that it did this work satisfactorily to the defendant, and that it was admitted, and accepted by its officers as a compliance with the contract. In this connection, defendant's counsel say that while the court evidently intended to sustain their contention, viz., that the contract required the machine to take the ore out of the pulverizers, he failed to clearly state that in his charge. An examination of the charge has led us to a different conclusion. He said:

"I cannot give the interpretation to the contract which the counsel for plaintiff seeks to have me give, and I

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therefore charge you, with reference to this system, the phrase which is embodied in the contract, 'the contractor guarantees that each plant will convey all of the material pulverized to the fineness of 100 mesh and finer,' means, gentlemen of the jury, that that material should be taken from the pulverizer itself and removed to the bins. I think, gentlemen of the jury, that that is the natural import of the language, when the contract is construed as a whole."

The jury must have found that the machine actually did, or was capable of doing, what was contracted, according to the construction claimed for the contract by defendant, or that it was so accepted by the defendant. The broad question of the ability of the machine to do the work required was left to the jury. That included the question of whether it was a mechanical impossibility or not. He told the jury that the machine had not performed the work guaranteed, and said if the machine could not, under any operation, have been made to do the work, it was not a compliance with the contract. This covered the question as well as though the jury had been directed in other language to inquire whether the principles upon which it was planned were wrong, and the machine necessarily ineffective. The question was whether the machine did, or could be made to do, the work. The jury evidently found that it could have been made to do it under proper management.

The twenty-eighth request offered by defendant's counsel should not have been given, because the case was thereby made to depend upon whether the machine *had* done the work required, regardless of the question of management. The twenty-ninth was objectionable because it asked the court to decide that there was a breach of warranty if plaintiff's agent had certain knowledge at the time the contract was made, and contemplated delivery of the ore to the conveyor by the pulverizer. We are unable to say that the evidence was conclusive that plaintiff's dust system was "impractical, and mechanically impossible" of successful operation.

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Testimony was offered by the plaintiff to show that the first joint of the conveyor was not an "operative part." This was apparently under plaintiff's claim that the contract did not require it to take the dust out of the pulverizer. We attach little significance to the question, but inasmuch as the court afterwards held, and charged the jury, against plaintiff's claim, no injury was suffered by the defendant from the testimony.

The same may be said about the evidence of what this conveyor could do when attached to the Ball pulverizers. Defendant says that with these machines the product was discharged through a funnel. The court told the jury that something more was required, when he ruled upon the question of construction. The testimony was of some value under the plaintiff's theory, although it may have become immaterial later. It may have been admissible when offered. It certainly was not injurious.

The next question relates to the testimony of Allington as to the effect of beating free gold. It was called out in answer to the testimony of Barnes. We think the court committed no error in admitting the proof. It was harmless, at all events.

A point is made that the plaintiff was permitted to contradict the written contract. The contract provided for some supplemental collectors, which were not sent, but were made afterwards. Defendant's counsel claim that the jury were not permitted to allow the defendant compensation for them. It is admitted that the court left this to the jury as a disputed fact, while counsel for plaintiff had conceded it to be a proper charge. We think that the proceedings show pretty conclusively that the item was allowed, and therefore that the judgment should not be reversed upon this ground, if the assignment of error is sufficiently specific, which plaintiff's counsel deny.

Error is assigned upon the admissions of Rowley, a director, who is said to have stated, while *en route* from Colorado to Chicago with plaintiff's representative, that he had received a telegram from his people at Cripple Creek stat-

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ing that "they had made a thorough run that day, and had made good success with it; a good, successful run that day; everything satisfactory," —and to have made a similar statement to him after arriving at Chicago. There was further evidence as to the relation of Mr. Rowley to the work at Cripple Creek, and plaintiff's counsel claim that this shows that he was, with Barnes, in charge, and exercising authority consistent with the power to speak for the company. This testimony was undisputed, and was received under objection, and upon the undertaking to show that Mr. Rowley was really in charge of the work, and this was not done. These admissions were not a part of the *res gestæ*. They did not occur in connection with the performance of any act relating to defendant's business, within the scope of Rowley's authority. He was a director. As such, he had no power to accept this work, or to bind the company by an agreement in relation to it. The testimony that he was at Cripple Creek, giving directions, and that Barnes told Fralick that Rowley was going to Chicago, and would fix the matter up with Allington, even if Rowley was authorized to do that, would not make the admissions of Rowley to Fralick binding upon the company. While a corporation may be bound by the acts of one who is held out as having authority to act for it in its business, it does not thereby subject itself to liability for admissions made by such person, disconnected with the business of the principal. See Mechem, Agency, §§ 714, 715. In a note, the author says:

"'The acts of an agent,' said Mr. Justice Harlan in a recent case, 'within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, "being," says Phillipps, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent

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cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent himself to prove it; but, wherever what he did is admissible in evidence, there it is competent to prove what he said about the act *while he was doing it*." 1 Greenl. Ev. § 113.

"'This court had occasion, in *Packet Co.* v. *Clough*, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his treatise on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting a part of the res gestæ*," the court, speaking by Mr. Justice Strong, said:

"'"A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."'

"*Vicksburg, etc., R. R.* v. *O'Brien*, 119 U. S. 99 (7 Sup. Ct. 172).

"That the statements, representations, and admissions of the agent, made while acting within the scope of his authority, and in reference to the business which he is employed to transact, may be received in evidence against the principal, see" the many cases cited.

The defendant sought to show that it made further efforts to make the machine work after Fralick, plaintiff's agent, left, with a view to recouping the cost thereof. The court excluded the testimony upon the ground that inasmuch as the defendant claimed that he left, having "given the machine up as a bad job," the defendant should not make unnecessary expense, and, if it did so,

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could not recoup for it. We are of the opinion that, upon this record, the judgment should not be reversed for this reason.

We are constrained to reverse the judgment. A new trial is ordered.

MOORE, CARPENTER, and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

COLBURN *v.* I. STEPHENSON CO.

PUBLIC LANDS — HOMESTEAD — TIMBER — UNLAWFUL CUTTING — EVIDENCE.

In an action for the purchase price of certain logs, evidence considered, and *held* to show conclusively that the logs were unlawfully cut from land held under an unperfected homestead entry, and to warrant the direction of a verdict for defendant.

Error to Delta; Stone, J. Submitted January 16, 1903. (Docket No. 55.) Decided June 23, 1903.

Assumpsit by John D. Colburn against the I. Stephenson Company for goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

F. D. Mead, for appellant.

Cummiskey & Yelland, for appellee.

HOOKER, C. J. Colburn owned a shingle mill. He claims that he loaned some money to Frank Steits for logging purposes, not knowing where he intended to do the logging, paying the money from time to time on orders, and directly to Steits. Steits was to sell the logs to the defendant, but the money was to be paid to Colburn, under an arrangement made with defendant's alleged pur-

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chasing agent, one Wells, when he purchased the logs. The defendant received the logs, and in April, 1901, a claim was made by Dwyer, a special agent of the general land office, that the logs were fraudulently cut from government land. The logs were cut from a tract of land which was entered as a homestead in 1900 by one Malcolm Beaton. Steits advanced him about $375, which plaintiff claims to have been used in buying a relinquishment from Mr. Smith, a former entryman, and in building a house, and a road to the premises from the main road, half a mile distant, and in digging a well. It is claimed by the plaintiff that, at the time Steits furnished the money to Beaton, he purchased from him some or all of the standing timber on the lot, which he proceeded to cut, employing several men in the work, paying the expenses from the money borrowed of Colburn, the plaintiff.

Dwyer investigated the transaction, and made the claim that Beaton was not acting in good faith with the government in selling the timber to Steits, that it was not necessary that it be cut for the purpose of cultivating and improving the land, and was in fact a scheme to get the timber. He found that the timber had been sold to defendant, and demanded the price from it, threatening suit unless it should pay the agreed price to the government, which it did. This action was then brought against the defendant, the declaration being the common counts, with a bill of particulars in the usual form for a quantity of logs sold to defendant by the plaintiff at certain prices. There was no dispute upon the trial as to quantities or prices. Accompanying the plea of the general issue, defendant's notice alleges the unlawful cutting of the timber, that it was a trespass upon government lands, that it violated the homestead law, that Beaton had abandoned the homestead, that the title to both land and logs was in the federal government at the time the action was commenced, that plaintiff never had a legal title to the logs sold to defendant, and that it had paid the true owner, viz., the government, for the logs. It was conceded upon

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the trial that Beaton abandoned the homestead before the action was brought. The plaintiff claimed that the timber cut came from a strip of 15 acres which Beaton intended to clear, and that it was cut in a *bona fide* effort to clear and improve the land. Steits is said to have testified, however, that one-fourth of the pine and cedar came from other portions of the land. The court left the question of good faith to the jury, and charged that the title to such timber as was cut from other parts of the land than the 15-acre tract belonged to the government. A verdict was returned in favor of the plaintiff for $548.12, the one-fourth of the timber being deducted from the plaintiff's claim, in accordance with the charge. A request that a verdict be directed in favor of the defendant was refused.

We are satisfied that there was testimony in the case from which the jury might have found that this timber was purchased by defendant from Colburn. It is significant that he should advance to an irresponsible man like Steits $1,100 *as a loan* without security; and, had the jury found that Steits was merely his agent, and that they were both engaged in plundering government lands, we could not set aside the verdict for want of evidence. There is ample evidence, therefore, from which it may be inferred that Colburn, and not Steits, was the principal in the sale to the defendant. This eliminates the question of the statute of frauds.

The agency of Wells is supported by the evidence, especially as the defendant has accepted the benefit of his purchase.

The principal question is whether the judge should have instructed the jury that this cutting of timber was fraudulent and wrongful. That the jury would have been justified in finding that it was is obvious, and, in our opinion, the evidence not only preponderates in that direction, but we cannot say that there was any substantial evidence tending to prove that the timber recovered for was cut in a *bona fide* effort to cut off and improve a parcel of 15 acres for cultivation. In our opinion, the testimony establishes

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a clear case of timber stealing, in which Steits and Beaton participated, and there is strong ground to suspect that the plaintiff was not an innocent party in the transaction.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

BEUNK *v.* VALLEY CITY DESK CO.

1. INJURIES TO SERVANT—BOILER EXPLOSION—NEGLIGENCE—EVIDENCE.

   Where, in an action by an employé for injuries caused by the explosion of a boiler, alleged to have been due to overpressure, it appeared that the boiler had recently been repaired and tested by a competent workman, who had pronounced it safe to be operated under a pressure higher than that carried at the time of the accident, and that it had been successfully operated for several years under such higher pressure, and all of the expert witnesses testified that they should have thought it capable of withstanding it, a verdict should have been directed for defendant.

2. SAME—INSTRUCTIONS—DEGREE OF CARE.

   An instruction in such action that it was the duty of defendant to furnish a safe and suitable boiler, and then keep it in that condition, and that defendant was bound, in using it, to keep within the limits of safety, was erroneous as imposing too high a degree of care; reasonable care only being required.

Error to superior court of Grand Rapids; Newnham, J. Submitted January 16, 1903. (Docket No. 53.) Decided June 23, 1903.

Case by William Beunk, Jr., against the Valley City Desk Company, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

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William R. McGarry (*Knappen, Kleinhans & Knappen*, of counsel), for appellant.

Hatch & Wilson, for appellee.

GRANT, J. For a statement of this case and the issues involved, see 128 Mich. 562 (87 N. W. 793).

The sole claim of liability is that the boiler exploded from overpressure. This depends solely upon the testimony of one expert witness that, in his opinion, the boiler exploded from that cause. The liability of defendant upon this record must be considered and determined in the presence of the following facts, established by the testimony of the expert witnesses of both sides:

1. Steam boilers may explode, even when all precautions possible have been taken to determine their soundness. One of the expert witnesses for the plaintiff, and the maker of the boiler, testified:

"I think it [the boiler here involved] would be likely to blow up at any time, and liable to blow up at 40 pounds, too. Boilers are liable to blow up from various causes. I consider a boiler as dangerous as a keg of powder with a lighted candle around it. That is the natural way of looking at it. That is true of all boilers."

Another expert testified:

"There is always danger around a boiler. It is liable to go off at any pressure, and that is as true of new boilers as of old ones."

Still another testified:

"Explosions in manufactories are of comparatively quite frequent occurrence, and always have been. Occasionally a new boiler explodes, as well as an old one. It is difficult to determine just what the exact cause of an explosion is, there being always a question of possibility one way or another from the nature of the explosion, because quite generally, when an explosion occurs, it takes with it all evidence of its cause."

The expert testimony on the part of the defendant is to the like effect.

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2. "There is no positive duration to the life of a boiler. It all depends upon its use during the time it is being operated, and they are all more or less under the control of the engineer, and the various conditions that exist."

3. Manufacturers are justified in using boilers when made and repaired by responsible boiler makers, upon the assumption that they are safe, and are not liable for explosions when used in a proper manner.

Plaintiff's main expert witness testified:

"If the boiler maker was responsible, I should think you would be warranted in using the boiler he had turned over to you after pronouncing it safe. As a matter of fact, that is the usual custom among boiler manufacturers. All manufacturers defer to the opinion of the boiler maker in accepting a boiler, whether new or repaired, as safe."

His other expert witness testified as follows:

"*Q.* If a boiler maker had repaired the boiler, and had subjected it to a hydrostatic test, and turned it over to the manufacturer after pronouncing it safe to work at a given steam pressure, would it be allowable and customary among manufacturers to accept the opinion of the boiler manufacturer as binding and conclusive?

"*A.* It would."

One of the plaintiff's expert witnesses testified as follows:

"*Q.* If this boiler, for a period of 11 years, had been subjected to a steam pressure of 100 or 105 pounds, in constant use, what effect would that have upon the boiler?

"*A.* In my opinion, it would practically condemn the boiler for usage."

Another of his expert witnesses testified as follows:

"*Q.* What, in your judgment, would be the safe working pressure of this boiler in October, 1898, it having been operated 11 years at a pressure of 100 to 105 pounds, and a year or so after that at 90 pounds?

"*A.* That information would not be sufficient to base any judgment on. In fact, a person, to determine or base any judgment on the actual safe working pressure of a

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boiler after that term of years of service, would of necessity make an examination of the boiler itself."

The mere fact of the explosion is not, alone, evidence of overpressure. The only evidence of the pressure at the time comes from two of plaintiff's witnesses,—Mr. Raynourd, the engineer in charge, who testified that, only four or five seconds before the explosion, the steam-gauge showed a pressure of 85 pounds, and Mr. Lindeman, who testified that he looked at the gauge from 15 to 20 minutes before the accident, and it was carrying somewhere between 80 and 90 pounds. There is no reason to discredit the testimony of the engineer, and his is the only testimony showing the pressure immediately before the accident. This engine had been in use about 13 years prior to its use by the defendant, and had been used by it about one year. For four years prior to its use by defendant, the safety valve was set to blow off at 105 pounds, and, while in use by the defendant, at 90 pounds.

The testimony upon the safe working pressure of this boiler is as follows: Henry Balcom, who had run this engine for four years prior to its purchase by the defendant, an engineer of 30 years' experience, testified: "I considered the boiler safe at 105 pounds steam pressure." Byron Parks testified: "In my judgment, the safe working pressure of the boiler would be somewhere between 85 and 90 pounds when new." Mr. Raynourd, the engineer who was running it at the time, testified: "I considered it capable of standing at least 95 pounds per square inch at a safe working pressure." These three were witnesses for the plaintiff.

For the defense, Mr. Meyer, superintendent of the board of public works of the city of Grand Rapids, formerly chief engineer of the street-railway company, who had been for 12 years the chief engineer of manufacturing concerns, had run locomotives, had an actual experience of 20 years in running boilers, and was familiar with the tensile strength entering into the construction of boilers, testified

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that the safe working pressure was 103 pounds and a fraction. This witness also made the same examination that plaintiff's expert witness Mr. Brobst made after the explosion, and testified that, in his judgment, "the boiler did not explode from overpressure." Mr. Peterson, the engineer and boiler maker who repaired it, as hereinafter stated, testified that the boiler "was capable of withstanding a safe working steam pressure of between 90 and 100 pounds, and that it would be safe at that pressure for several years." He also testified that he had made a computation, according to the rules, and ascertained the safe working pressure to be 103 4-10 pounds.

The only other testimony which could be considered as having any bearing upon the point is that of plaintiff's witness Brobst, who manufactured the boiler. He testified that the boiler was a 75 horse-power boiler, and when built he thought it was for 75 pounds of steam, which he considered a safe working pressure.

Mr. Peterson testified:

"After repairing the boiler, and before turning it over to Mr. Hodges, I pronounced it safe, and, according to my experience, it would be safe to work every day at between 90 and 100 pounds, and I so reported to Mr. Hodges."

This testimony of Mr. Peterson is undisputed. After repairing the boiler and applying the hammer test, Mr. Peterson applied the hydrostatic test of 125 pounds pressure. The experts agree that the hydrostatic test is one of the surest and best.

As to the working of the boiler on the day of the accident, Mr. Raynourd testified:

"When regulating the valve by the two levers and weights, I observed the steam-gauge register 75, 80, and 90 pounds, respectively, according to the adjustment of the weights at various distances from the fulcrum. It blew off at 90 pounds, according to the steam-gauge when so regulated, and remained in that condition all the time up to the accident. * * * The valve operated freely that day, and blew off at a pressure of 90 pounds the middle of the forenoon."

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It conclusively appears from the record now presented to us that the defendant had performed its full duty towards its employés in furnishing a safe boiler, a competent engineer, inspectors, repairers, and testers of the boiler; that after being informed by the repairer, a man thoroughly competent and experienced, that it was safe to work under a pressure of 90 to 100 pounds, the safety valve was set to blow off at the lowest limit of safety, rather than the highest; that the boiler actually exploded at or about the pressure of 85 pounds; that, for several years prior to its use by defendant, the safety valve was placed at a pressure of 105 pounds, and that immediately upon its showing signs of leaking, a few months before the accident, the defendant caused it to be properly repaired and tested, and that it had shown no signs of weakness prior to the explosion. The sole basis for any liability is that the defendant used this engine at too high a pressure, and that it should have been known that its use under such a pressure was dangerous.

Unless it was negligent to run this engine under a pressure of 85 pounds, the defendant is not liable. Was not the defendant justified in relying upon the statements of the engineer who repaired and tested the boiler, upon its previous record, and upon the opinion of the competent engineer whom it had placed in charge? If it was not so justified, then it becomes the absolute insurer of the safety of the boiler. This court, speaking through my Brother MONTGOMERY, in *Woods* v. *Railway Co.*, 108 Mich. 396 (66 N. W. 328), defined what a reasonable inspection was, in a case where a locomotive boiler had exploded. The instruction by the trial court, which was held to state the correct rule, is as follows:

"If you believe from the evidence given you in the case that these tests were made—actually made—by the defendant; that is, that this engine was overhauled and inspected, and subjected to the hydrostatic test, by competent men, within two years of the time of the explosion, and also thoroughly and carefully tested by the hammer test, by

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competent testers, within 30 days from the time of the explosion,—I say, if you find these tests were made, then defendant has done all that it can be asked to do, and would not be guilty of negligence, and ought not to be held in this action."

Applying that rule to this case, the defendant had done all the law required. To hold it liable would be to say that it was negligent in running the engine at a pressure fixed by competent engineers as safe, and found by an experience of several years to be safe. Where a railway company purchased a locomotive from a firm of locomotive builders of recognized high standing and reliability, and had made a trial trip as a test, and the locomotive had operated safely in active work for a distance of over 7,000 miles, during a period of five or six months, it was held that the company had complied with the full measure of duty. *Clyde* v. *Railroad Co.*, 65 Fed. 482. In a case where the facts were much stronger for the plaintiff than in this case, the supreme court of Illinois held that there was no liability. *Indianapolis, etc., R. Co.* v. *Toy*, 91 Ill. 474 (33 Am. Rep. 57). See *Smoot* v. *Railway Co.*, 67 Ala. 13. Where a boiler exploded and recovery was sought by an employé upon the ground that the boiler was defective and unfit for use, and that such defect and unfitness were known, or by reasonable care might have been known, to the servants of the company whose duty it was to keep such machinery in repair, it was held incumbent upon the plaintiff to show that the boiler exploded by reason of the particular defects insisted on by the plaintiff. *Texas, etc., R. Co.* v. *Barrett*, 166 U. S. 617 (17 Sup. Ct. 707). See, also, *Gohen* v. *Railway Co.*, Fed. Cas. No. 5,507. Where an employé received an injury caused by an explosion of the crown sheet of a boiler, and a week before the accident a careful examination was made and no weakness discovered, and the boiler was afterwards subjected to a test of 145 pounds pressure,—its proximate capacity,—and resisted that pressure, and subsequently exploded under a pressure of only 110

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pounds, it was held that there was not sufficient evidence of defendant's negligence to be submitted to the jury. *Racine* v. *Railroad Co.*, 70 Hun, 453 (24 N. Y. Supp. 388). See, also, *Ballard* v. *Manufacturing Co.*, 51 Hun, 188 (4 N. Y. Supp. 940); *Reiss* v. *Steam Co.*, 128 N. Y. 103 (28 N. E. 24). Where a party, in the face of warning and of an apparent defect, chose to rely upon the assurance of the manufacturer, he is not excused from liability. *Spencer* v. *Campbell*, 9 Watts & S. 32.

The engineers employed to control and examine this boiler were daily about the engine. The officers of the defendant, who were its *alter egos*, were also frequently around it. That they considered it safe is apparent, else they would not have risked their own lives in its vicinity. A due regard for their own lives and property would naturally lead them to the exercise of due care. No one had even intimated to defendant that there was any danger to be apprehended from a pressure of 90 pounds or less.

This disposal of the case renders it unnecessary to discuss the question of the alleged negligence in placing a second lever upon the safety valve, because the boiler exploded under a pressure lower than that at which it was set to blow off.

In view of a new trial, it is proper to say that we think the court erred in charging the jury as follows:

"And if an employé is injured by reason of defective or unsuitable machinery, the master will be liable in damages, unless he can clearly show due care and caution in the providing and keeping of the same. * * * It was the duty of the defendant, first, to furnish a safe and suitable boiler, and then to keep it in that condition. * * * In the use of this boiler, the defendant was bound to keep within the limits of safety."

These portions of the charge imposed a greater degree of care than the law requires. Reasonable care is all that the law requires. This reasonableness is to be measured, of course, by the dangers incident to the business and the machinery in use.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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WILLIAMS *v.* MICHIGAN CENTRAL RAILROAD CO.

1. LANDLORD AND TENANT — RE-ENTRY — RIGHTS AND LIABILITIES OF SUBTENANTS.

   A provision in a lease that, on re-entry for nonpayment of rent, the subleases shall belong to the lessor, does not create such a relation between the landlord and a subtenant as to entitle the latter to hold the premises during the term, or make him liable to the landlord as tenant.

2. SAME—SURRENDER BY TENANT.

   Where a landlord accepts from his tenant a surrender of the premises, and an assignment of the tenant's interest in subleases, but there is no reservation from the surrender, and no confirmation of the subleases, such assignment does not entitle the landlord to hold the subtenants.

3. SAME—TERMINATION OF TENANCY—NOTICE TO QUIT.

   The relation of a subtenant to the original lessor cannot be affected by an agreement made between the lessor and the lessee after the termination of the latter's rights by notice to quit, though before a relinquishment of possession.

Error to Wayne; Hosmer, J. Submitted February 3, 1903. (Docket No. 62.) Decided June 23, 1903.

Assumpsit by John R. Williams and others against the Michigan Central Railroad Company for rent. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Reversed.

Henry Russel and *Wells, Angell, Boynton & McMillan* (*Ashley Pond*, of counsel), for appellant.

William J. Gray and *Robert T. Gray*, for appellees.

HOOKER, C. J. Plaintiffs, being owners of a business block in Detroit comprising 10 or 12 stores upon the first floor, and a corresponding area devoted to offices on other floors, leased said block, on April 30, 1894, to Friend

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Palmer, for a period of 40 years, at an annual rental of $16,000. On April 1, 1897, Friend Palmer leased one of the stores to the Michigan Central Railroad Company, the defendant, for the period of one year from May 1st, at an annual rental of $3,000, with an option to the defendant for the renewal of the lease for the further period of one year, and on April 1, 1898, it wrote Mr. Palmer a letter electing to renew the lease for a year. On December 27, 1898, Friend Palmer was indebted to the plaintiffs on his lease in the sum of $9,500, and upon that day they filed a complaint with the circuit court commissioner to recover the possession of the block. A summons was served upon Palmer on December 28th. On December 31st the case was adjourned, and on January 3, 1899, a judgment of restitution was rendered by the commissioner.

The defendant vacated the store in the month of December, 1898, and on January 11, 1899, it wrote to plaintiffs' solicitors as follows, viz.:

"*Gentlemen:* Referring to the room in the Merrill Block, so called, in this city, which this company lately occupied for a ticket office under contract with Friend Palmer: I am informed that Friend Palmer's right of possession to said office was terminated by the judgment which your clients, the said John R. Williams *et al.*, recovered against him on the 3d inst., before William A. Hurst, circuit court commissioner. That being the case, and as the rights of this company in said room as subtenant of said Palmer were necessarily terminated by such judgment, this is to advise you that this company has already vacated said premises, and that no proceedings on behalf of your clients to recover possession of said premises will be necessary so far as this company is concerned."

On the same day it wrote to Thomas W. Palmer, who claimed the rent due from it to Friend Palmer, as follows, viz.:

"Hon. THOMAS W. PALMER,
"Detroit.

"*Dear Sir:* Referring to the bill presented by you to this company for $250 rent of office in the Merrill Block, this city, for January, 1899, as per terms of lease from

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Friend Palmer to this company, dated April 1, 1897, I am informed that Friend Palmer's right of possession to said office, and all other right, title, and interest of said Friend Palmer therein, ceased on the 3d inst.; the same having been terminated and ended by a judgment of William A. Hurst, one of the circuit court commissioners for the county of Wayne, of that date, in favor of John R. Williams *et al.*, and against the said Friend Palmer, and that such judgment also terminated all rights which this company, as subtenant of said Friend Palmer, had at that time in said office. That being the case, I am advised that all obligation on the part of this company to pay rent for said office after January 3, 1899, has ceased."

It sent a letter of like import to Friend Palmer on the same day.

The keys of the store were tendered to plaintiffs' attorneys on January 12, 1899, by defendant. The plaintiffs were entitled to have a writ of restitution issued against Friend Palmer on January 9, 1899. Whether the writ was issued or not is uncertain. At all events it was not served; Friend Palmer agreeing to surrender possession, as shown by the following letter, viz.:

"FRIEND PALMER and Hon. THOMAS W. PALMER,
"City.

"*Gentlemen:* My clients being now entitled to a writ of restitution for the Merrill Block, so called, leased to Friend Palmer under date of April 30, 1894, it is arranged, in order to avoid actual execution of a writ of restitution, that possession shall be voluntarily surrendered to them, and accordingly you have given us an order for the collection of the rents from January 1st out. It is understood that this is without prejudice to either of us as to the rents prior to that date, and without prejudice to any claim that we may have against you or either of you in the premises. Yours truly,
"WILLIAM J. GRAY."

On January 13, 1899, Friend Palmer executed the following assignment, viz.:

"I hereby assign and transfer to John R. Williams, G. Mott Williams, and Josepha W. Douglas all my right, title, and interest in and to a certain lease made by me to

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the Michigan Central Railroad Company for store room, northeast corner of Jefferson and Woodward avenues, Detroit, Michigan, and in and to all moneys now due or hereafter to become due. Lease attached hereto.

[Signed] "FRIEND PALMER."

No consideration was paid, nor was any credit given to Friend Palmer on the plaintiffs' claim, for this assignment.

Plaintiffs' counsel declined to receive the keys when tendered by the defendant; but later, and on February 1, 1899, they consented to receive them, without prejudice to the rights of either party, and with the understanding that counsel, as the agents of the owners, should take charge of and rent the property, if possible, and whatever should be received during the period of defendant's lease should be credited to it upon its rent, if it should be afterwards held that any rent was collectible under that lease. On March 15th, plaintiffs were offered $60 a month for the eastern portion of the store, and $100 for the remainder. They began making repairs about March 15th, but did not get the store ready for occupancy until May 1st.

This action was brought against the defendant to recover rent due upon the lease from Palmer. The declaration counted specially upon the assigned lease, and the common counts, including a count for use and occupation, were added. Counsel requested the court to direct a verdict for defendant, and, in the event of a refusal of such request, that the plaintiffs should not recover for rent later than January 12, 1899. These requests were refused, and a verdict was directed for the plaintiffs for the full amount claimed, less $160, allowed for rent which would have been earned after March 30th; the counsel for plaintiffs conceding that two weeks after March 15th would have been a reasonable time for the completion of the repairs, and refusing to give credit from March 15th.

By the terms of the original lease, it was agreed that, upon re-entry, the subleases should belong to the lessors. There is also testimony that, before restitution, Mr. Palmer promised to surrender possession without process,

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and possession was yielded and taken two days after the writ of restitution could have been issued. This promise was made by a Mr. Scott, said to be an agent of Mr. Palmer at the building; but the character of his agency was not shown, nor does it appear that the conversation occurred before the time limited by the notice to quit had expired. If there is any inference to be drawn from the testimony, it is that the talk occurred after that time; for the witness stated that it was known that plaintiffs intended to commence proceedings to obtain possession.

There is no dispute as to the character of the defendant's holding. It was clearly that of a subtenant, and there was no privity between it and the plaintiffs, unless such privity is to be predicated (1) on the provisions of the lease to Friend Palmer; (2) on the assignment, and the previous arrangement with Scott. Ordinarily a subtenant is not liable to the original lessor, there being no privity. 7 Enc. Laws Eng. 253; *Brewer* v. *Hill*, Anstr. 413; *Pleasant* v. *Benson*, 14 East, 237; *Holford* v. *Hatch*, 1 Doug. (Eng.) 183; *Earl of Derby* v. *Taylor*, 1 East, 502; 1 Platt, Leases, p. 103; 1 Wood, Land. & T. §§ 81, 89-92, 94, 322; 1 Taylor, Land. & T. §§ 109, 111; 18 Am. & Eng. Enc. Law (2d Ed.), p. 682, and cases cited; *Fulton* v. *Stuart*, 2 Ohio, 215 (15 Am. Dec. 542); *Davis* v. *Morris*, 36 N. Y. 569; *Austin* v. *Thomson*, 45 N. H. 113; *McFarlan* v. *Watson*, 3 N. Y. 286; *Robinson* v. *Lehman*, 72 Ala. 401; *Jackson* v. *Davis*, 5 Cow. 123 (15 Am. Dec. 451); *Marshall* v. *Lippman*, 16 Hun, 110; *Carver* v. *Palmer*, 33 Mich. 342; *Doty* v. *Gillett*, 43 Mich. 203 (5 N. W. 89); *Fisher* v. *Pforzheimer*, 93 Mich. 650 (53 N. W. 828); *Shannon* v. *Grindstaff*, 11 Wash. 536 (40 Pac. 123). Neither the agreement in the lease that the landlord should be entitled to the leases outstanding in case he should take possession by reason of nonpayment of rent by Palmer, nor the promise to Scott not to disturb the subtenants, created such a relation between plaintiffs and defendant as to entitle the latter to hold the premises during its term, or to make it liable to the plain-

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tiffs as their tenant. That such a relation might have been created by the mutual assent of these parties is not denied, but there is nothing to show it. 2 Taylor, Land. & T. § 517; Clark, Cont. § 75.

Counsel for the plaintiffs endeavor to support their claim by the contention that defendant's estate was not terminated, and that the plaintiffs are the assignees of Palmer's right to rent; and authorities are cited holding that a subtenant cannot be cut off by the surrender of his immediate lessor. The case of *Beal* v. *Car-Spring Co.*, 125 Mass. 159 (28 Am. Rep. 216), is cited as in point. In that case the landlord accepted a surrender subject to the rights of the subtenants in their subleases, of which he took an assignment, and which he confirmed and promised to respect. It was held that the privity of contract was transferred, and that the assignee might sue for the rent accrued, although the subtenant had ceased to occupy the premises. If we were to admit the correctness of this holding, it cannot apply here; for there was no reservation from the alleged surrender, nor was there any confirmation of the subtenant's lease. The original lease did not obligate the lessors to recognize the validity of subleases after forfeiture, although it provided that they should inure to the lessors' benefit. Scott was not shown to have had authority to bind Palmer in the arrangement with plaintiffs, whatever it may have been. Neither is it shown that Palmer had any interest in the premises at that time, but there is an inference to the contrary. The case of *Smith* v. *Building & Loan Ass'n*, 115 Mich. 347 (73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575), holds that, after the expiration of the time limited by the notice for the payment of rent, the lessee is a trespasser. If, as seems probable, this alleged agreement with Scott was made after that time expired, Palmer had no leasehold to surrender, but only a bare possession, and that wrongful. In any event, he did not surrender any estate, but waited until the forfeiture was judicially declared, and

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judgment of restitution made, when, to avoid eviction by writ of restitution, he gave up the possession.

We are of the opinion that a verdict should have been directed in favor of the defendant.

The judgment is reversed, and a new trial directed.

The other Justices concurred.

SPARLING *v.* SMELTZER.

1. REPLEVIN—PARTNERSHIP—QUESTION FOR JURY.

   In replevin for property claimed by plaintiff as surviving partner, the question of the existence of a partnership was properly submitted to the jury, where there was evidence from which they might infer a purpose to make the property common property, though it was quite as consistent with the theory that no such purpose existed.

2. SAME—GIFT—SUFFICIENCY OF EVIDENCE.

   In replevin for property claimed by plaintiff as a gift from defendant's decedent, evidence of decedent's statements, made during an illness, that he desired the property, then in the joint possession of plaintiff and himself, to be placed in the hands of plaintiff for a particular purpose, unaccompanied by evidence of plaintiff's acceptance of the property, and viewed in the light of the fact that for two years thereafter, and up to the time of his death, deceased exercised the same control over the property as theretofore, was insufficient to warrant a finding of a valid gift *inter vivos*.

3. SAME.

   But evidence of his subsequent statements that he had "given" the property to plaintiff, unless found to have related to the earlier transaction, was sufficient to justify such finding.

4. SAME—WITNESSES—MATTERS WITHIN KNOWLEDGE OF DECEDENT.

   In replevin for live stock claimed by plaintiff as surviving partner of defendant's decedent, plaintiff's testimony that,

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when stock was sold, the proceeds were divided between him and decedent, and that a certain animal was a part of the common stock, was inadmissible as relating to facts equally within the knowledge of deceased.

Error to Benzie; Chittenden, J. Submitted February 4, 1903. (Docket No. 117.) Decided June 23, 1903.

Replevin by Joseph Sparling against Abel M. Smeltzer and others. From a judgment for plaintiff, defendants bring error. Reversed.

D. G. F. Warner and *Pratt & Davis*, for appellants.

Thomas Smurthwaite (*George Whitbeck*, of counsel), for appellee.

MONTGOMERY, J. This is an action of replevin for several head of live stock. The plea was the general issue, accompanied by notice that the property in question was in his lifetime the property of one William Smeltzer, now deceased, and that the defendants now hold the same as executors of the estate of said William Smeltzer, deceased. The plaintiff was a son-in-law of William Smeltzer, and in 1896 was living on a farm in Pleasanton, Manistee county, Mr. Smeltzer residing at Joyfield, in Benzie county, some two miles distant. At this time Mr. Smeltzer was upwards of 80 years of age, and plaintiff's wife and daughter were alternately doing the household work for Mr. Smeltzer. In the fall of 1896, under some arrangement, the details of which are left in more or less obscurity by the testimony because of plaintiff's incompetency as a witness, plaintiff moved with his family onto the farm of Mr. Smeltzer, taking with him an amount of stock similar to that which Mr. Smeltzer owned, and up to the time of Mr. Smeltzer's death the two—that is, plaintiff and Smeltzer—conducted the farm, the plaintiff's wife looking after the housework, with the assistance of her daughter.

On the trial two theories were put forth by the plaintiff: The first is that the arrangement between himself and Mr

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Smeltzer amounted to a partnership, and that, as the surviving partner, he had the right, independent of his claim under the alleged gift hereinafter referred to, to possess and control the personal property on the farm for the purpose of closing up the business of the copartnership. The other theory was that there was a gift of all the personal property on the farm, belonging to Mr. Smeltzer, made to plaintiff, in trust for certain purposes. The plaintiff prevailed in the court below, and the defendants bring error.

It is the contention of the defendants that there was no testimony in the case which justified submitting either of plaintiff's theories to the jury; that is to say, it is urged that there was no evidence of partnership and no evidence of a completed gift. We have examined the record with great care, and we are not prepared to say that the record is wholly devoid of evidence tending to show a partnership. It is not enough that the testimony is to our minds quite as consistent with the theory that the parties intended no community of property. There is in the case evidence from which the jury might have inferred a purpose to make the property common property, and to treat the proceeds as the fruit of a common investment, the result of the original investment and the efforts of the two parties to the transaction. It is very true that there was much testimony in conflict with this theory. Testimony that the property was given in separately, for purposes of assessment, very strongly tended to support the defendants' theory; but we are dealing with the question as to whether there was any testimony tending to sustain the plaintiff's theory, and upon this question, without going into the record at length, we think there was such testimony.

The question whether there was evidence of a completed gift is one of perhaps more doubt. There was testimony that in 1898 a Mr. Joy was called in to make some papers for Mr. Smeltzer which disposed of his real estate. Mr. Smeltzer was ill at this time. Mr. Joy testified that, when

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he got through with the papers relating to the real estate, he asked Mr. Smeltzer if he wanted any papers drawn making a disposition of the personal property, but Mr. Smeltzer replied that he "had perfect confidence in Mr. Sparling, and he would put it into his hands to do with it as he would instruct him to do with it.

"*Q.* Did you hear what the instructions were that he was to do?

"*A.* Well, I heard some instructions. There had been some talk of building a church near there on Mrs. Sparling's land, and, referring to the personal property, Mr. Smeltzer said that Mr. Sparling should dispose of it, and put it in that church, if a church was built; if not, it was to stay in Mr. Sparling's hands; but I do not remember that Mr. Sparling said anything. I think I have told all that I heard of the conversation in regard to the instructions given to Mr. Sparling. I had no conversation with Mr. Smeltzer relating to the matter after that."

Another witness, a Mr. Lathwell, testified that Mr. Smeltzer said on this occasion that he wished the stock to be "used in the interest of the church—in building the church—if one was built in that neighborhood. If one was not built in that neighborhood, he wished the stock to be used in the interest of the church nearest by, and to be left in Mr. Sparling's hands for that purpose, and to be used according to his best judgment, disposing of it for that purpose."

Plaintiff's daughter testified:

"I heard grandfather say something about personal property, that he gave it into pa's charge, and if there was a church built at Saile he was to use some of it to help the church, and, if not, he was to have the rest. It was to be left in his hands."

Another witness[1] testified to a later conversation with Mr. Smeltzer in which he stated to her that he had disposed of the personal property,—that he had given it all to Mr. Sparling. Were it not for this last testimony, we should hesitate to say that there was any evidence to show

[1] *I. e.*, Mrs. Albertson.

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a gift *in præsenti*. There was no manual delivery of property, and while, under the circumstances of this case, this may not have been possible, and therefore not necessary, there was, according to the testimony of Mr. Joy, no acceptance of the property by word. A fair construction of this language would import an expression of a purpose which might possibly amount to a gift *causa mortis;* but, after this conversation occurred, Mr. Smeltzer recovered sufficiently to be about and again attend to his duties on the farm, and for some two years the business appears to have been conducted precisely as before, and, when anything was sold upon the farm, the money was in whole or in part paid into the hands of Mr. Smeltzer. This is seemingly wholly inconsistent with the theory that the title to this property had passed to plaintiff under a completed gift in May, 1898. Under the authority of *Davis* v. *Zimmerman*, 40 Mich. 24, it may be said that there was some evidence in the testimony of Mrs. Albertson that there had been a gift of this property. But as this was controverted, and we are not to pass upon a question of fact, this question was properly one for the jury, although we think it would have been proper to instruct the jury that, if all that the alleged admission testified to by Mrs. Albertson referred to was the transaction of 1898, this should not be deemed to have constituted a completed gift.

It will be gathered from what has already been stated that the case is a very close one on the facts, and that the rules in relation to the admission of testimony should have been very strictly adhered to. A theory was put forth, and evidently accepted by the jury, wholly at variance with many of the acts of the parties, and, before such verdict should be sustained, it should be clear that the jury were not controlled by any incompetent testimony. The plaintiff himself was a witness, and testified that, "when we had any stock fit to sell, I sold it. *Q.* What was done with the proceeds? *A.* Divided it up between us." Defendants' counsel moved to strike this statement out as relating to a fact equally within the knowledge of

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the deceased, and the motion was overruled and exception taken. Again, when recalled on re-direct examination, he was asked: "*Q.* This heifer was part of this common stock?" This was objected to for the same reason, and the objection was overruled. We think each of these rulings was error. It is very clear that, upon the theory of the plaintiff, the deceased must have known what was the common stock or common property on the farm. He certainly must have known whether or not the proceeds of the sale of stock were divided between himself and plaintiff. The plaintiff, therefore, was permitted to testify to facts which, if true, were equally within the knowledge of the deceased, and this testimony went to the very gist of the case. The testimony may have been, and we are constrained to think it was, controlling of the issue.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

EWING v. McINTYRE.[1]

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1. PROBATE COURTS—JURISDICTION—LOST WILLS.
   Under 1 Comp. Laws, §§ 650, 651, conferring general authority on probate courts to probate wills and settle estates, a probate court may admit to probate a lost or destroyed will.

2. SAME—APPEAL—AMENDMENT OF PETITION.
   A petition for the probate of a lost will may be amended in the circuit court on appeal by setting up the contents of the alleged will, the case having been fully tried in the court below.

Error to Wayne; Donovan, J. Submitted February 4, 1903. (Docket No. 70.) Decided June 23, 1903.

[1] Rehearing denied October 5, 1903.

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Petition by Augusta Ewing for the probate of a lost or destroyed will, alleged to have been executed by Archibald P. McIntyre, deceased. The petition was denied in the probate court, and proponent appealed to the circuit. From a judgment for contestants, Delos McIntyre and others, on verdict directed by the court, proponent brings error. Reversed.

Maybury & Lucking (*Dohany & Dohany* and *Richard I. Lawson*, of counsel), for appellant.

Bowen, Douglas, Whiting & Murfin and *S. S. Babcock*, for appellees.

HOOKER, C. J. We are asked to decide in this cause whether there is jurisdiction in our probate courts to probate a lost, suppressed, or destroyed will, when the citation of such a court is ineffective to compel its production before the court.

One Augusta Ewing made the petition for probate, as a beneficiary. It states the decease of one Archibald P. McIntyre, in May, 1900, leaving a will, and an estate of about $200,000 in real and personal property. The names of the heirs at law are given, all being collateral. It also names some heirs of his wife, who are said to be beneficiaries under the alleged will. Petitioner is a niece, and her petition states, upon information and belief, that testator duly executed the will after September 1, and before October 31, 1896; that his brothers were given nothing by the will; that the will was placed in his private box, with his papers, and kept in his desk up to the time of his death; that while he lay dead, and on May 14, 1900,—as she is informed and believes,—two of the persons named examined these papers, and removed them all, including the will, and, immediately after the funeral, hastily and unexpectedly departed for New York, with the papers and other property, and have not returned the will, but instead, on petition of one Helen Lamphere, have been and are proceeding with the administration of the estate

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in their own interest, as heirs at law of the deceased, ignoring the rights of the beneficiaries under the will, who are entitled to it. The petition prayed that the will be admitted to probate, and for citations and processes necessary for its discovery and production, and special administration meantime. The printed record contains nothing to show what was done in probate court, but counsel for the appellees state in their brief that citations were issued, and no will was discovered, and the petition was denied. An appeal was taken, and came on to be heard before the circuit court, and, after a statement of proponent's case, the judge directed a verdict for the respondents (or contestants), whoever they may be. The printed record does not seem to show who made the defense, or who appeared and answered, or the nature of the answers, if any were filed. The proponent has appealed.

Objection was made to the introduction of proof under the petition, for the reasons:

1. Because it shows the alleged will to have been stolen, and that no effort has been made to bring in the persons who are alleged to have taken it.
2. That the contents and provisions of the alleged will are not stated.

Counsel for the proponent admitted the insufficiency of the petition, and asked to amend. It was stated that the point was raised in probate court, where the merits of the case were apparently litigated. The court declined to permit an amendment, and appears to have held not only that the petition was inadequate, but that under the statement of counsel in opening, which was quite full, a valid will had not been shown, and therefore directed a verdict for the respondents. Counsel supplemented the statement before the ruling, by offering to prove the "due execution of a will by the deceased in October, 1896, or facts sufficient to go to the jury;" that it was abstracted and removed, if not destroyed, by interested parties; that it existed when testator died; and to prove fully its contents as a complete will, which contents they offered to make a part of the petition by amendment.

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If the probate court had jurisdiction to permit the establishment and probate of a lost or destroyed will, we think the court had power to permit the amendment under the circumstances, the case having been fully tried in probate court, and that he would have done so but for his belief that the verdict should be directed for other reasons. We understand from the record and from the briefs that the real point upon which the action was taken was that it was not within the jurisdiction of a probate court to admit to probate a lost or destroyed will.

The jurisdiction to admit wills to probate is now quite generally conferred upon probate courts, and in other States this extends to lost and destroyed wills, in some cases depending upon statutes expressly conferring such jurisdiction, in others, under general statutes authorizing the probate of wills and administration of estates. We are of the opinion that the weight of authority sustains the jurisdiction under such general statutes, notwithstanding the case of *Buchanan* v. *Matlock*, 8 Humph. 390 (47 Am. Dec. 622), which holds the contrary. *Morningstar* v. *Selby*, 15 Ohio, 345 (45 Am. Dec. 579); *Gaines* v. *Chew*, 2 How. 619; *Gaines* v. *Hennen*, 24 How. 553; *Waters* v. *Stickney*, 12 Allen, 1 (90 Am. Dec. 122); *Clark* v. *Wright*, 3 Pick. 67; *Davis* v. *Sigourney*, 8 Metc. (Mass.) 487; *Happy's Will*, 4 Bibb, 553; *Graham* v. *O'Fallon*, 3 Mo. 507; *Apperson* v. *Cottrell*, 3 Port. (Ala.) 51 (29 Am. Dec. 239); Thornt. Lost Wills, §§ 5, 6, where the above cases are reviewed. Extended discussions of the subject will be found in several of these cases, especially *Adams* v. *Adams*, 22 Vt. 50, and *Dower* v. *Seeds*, 28 W. Va. 113, 139, 143 (57 Am. Rep. 646).

In Michigan the statute confers in general language upon probate courts authority to probate wills and settle estates. 1 Comp. Laws, §§ 650, 651. In *Lloyd* v. *Wayne Circuit Judge*, 56 Mich. 243 (23 N. W. 31, 56 Am. Rep. 378), Mr. Justice CAMPBELL says:

"There has never been any proceeding known to our laws for the mere purpose of establishing the will even

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of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some States devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately."

See Gary, Prob. Law, § 189, and note.

The question has not been squarely raised in many, if any, Michigan cases, though it was involved in the recent case of *Lincoln* v. *Felt*, 132 Mich. 49 (92 N. W. 780). There a destroyed deed was admitted to probate as a will on appeal from probate court, and the order was affirmed. For other cases bearing upon the question more or less directly, see *Lawyer* v. *Smith*, 8 Mich. 423 (77 Am. Dec. 460); *Harring* v. *Allen*, 25 Mich. 505; *In re Hope*, 48 Mich. 518 (12 N. W. 682); *In re Lambie's Estate*, 97 Mich. 49 (56 N. W. 223); *Cheever* v. *North*, 106 Mich. 390 (64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499).

Assuming that an order followed the verdict, the same will be reversed, and a new trial ordered.

CARPENTER, GRANT, and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

MCCULLOUGH v. GREENFIELD.

1. FALSE IMPRISONMENT—ILLEGAL ARREST—MISDEMEANOR—WARRANT.

   Arrest for a misdemeanor at one place, by direction of an officer who is at another place with the warrant, is illegal.

2. SAME—WAIVER—PLEADING GUILTY.

   Liability for an illegal arrest is not waived by the person, when

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arraigned, making no objection to the manner of the arrest, and pleading guilty.

3. SAME—DAMAGES.

Where an arrest was made within the jurisdiction of the court issuing the process therefor, and was illegal only because the officer having the warrant was not present, but it was made by his direction, damages could be recovered only to the time he took the prisoner into his custody.

4. SAME—HANDCUFFING PRISONER.

Where an officer has two prisoners, strangers to him, and it is long after dark, and he has a considerable distance to go with them, his liability for an illegal arrest is not increased by his handcuffing them.

Error to Kalamazoo; Adams, J. Submitted February 18, 1903. (Docket No. 87.) Decided June 23, 1903.

Case by Robert McCullough against Burr Greenfield for false imprisonment. From a judgment for plaintiff, defendant brings error. Reversed.

Harry C. Howard, for appellant.

Thomas, Cummins & Nichols, for appellee.

MOORE, J. This is a case for false imprisonment. In the spring of 1901, while engaged in distributing advertising matter in the city of Kalamazoo, the plaintiff was stopped by one of the city policemen, and referred to the city clerk's office for a license to distribute advertising matter, which he applied for and obtained. The defendant claims that, at the time the plaintiff was applying for the license, the defendant explained to him there was an ordinance of the city of Kalamazoo against nailing advertising matter on telephone poles, and the plaintiff promised, if he was permitted to have the license for distributing advertising matter, he would not tack placards upon the poles. The plaintiff denies having this conversation.

The plaintiff, after obtaining his license, distributed his advertising matter, and, on the last day of his sojourn in

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Kalamazoo, nailed placards on a very large number of telephone, telegraph, and municipal lighting poles throughout the city, and immediately left for Battle Creek. The defendant reported the matter to the city attorney, and under his advice complaint was made, a warrant issued, and placed in the hands of the defendant for service. After the defendant obtained the warrant, he telephoned to the police clerk at Battle Creek that he had a warrant for the arrest of the plaintiff and one McBride, and, if they were in the city of Battle Creek, to detain them until he could arrive.

The plaintiff and McBride were arrested by Officer Hamilton, of Battle Creek, and detained at the police station for about three hours, when Mr. Greenfield, with his warrant, arrived and took the men into custody. About 8 o'clock, it being after dark, the defendant put upon the plaintiff and McBride handcuffs, boarded the interurban car for Kalamazoo, and, after changing cars twice *en route*, reached their destination late in the evening, about 10 or 11 o'clock. The plaintiff and his companion were detained at the jail at Kalamazoo until morning, when they were taken before Recorder Browne, where they each pleaded guilty, paid their fine, and left the city. Some months later the plaintiff instituted this suit. It was conceded the plaintiff was guilty of a violation of a valid ordinance, and no question is raised about the regularity of the warrant.

The trial judge charged the jury, among other things, as follows:

"I charge you that, under the undisputed evidence in the case, the arrest of the plaintiff at Battle Creek on April 25, 1901, by Police Officer Hamilton of that city, and his detention in the jail at that place for the space of three hours or thereabouts, was illegal and without authority of law, and constituted a false imprisonment of the plaintiff. If this unlawful imprisonment of plaintiff at Battle Creek was at the request of and under the instructions of the defendant, Greenfield, it became and was in

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law his act, just as much as though he had done it himself, and he, defendant, Greenfield, is responsible to plaintiff, McCullough, for all such damages as you may find he suffered during the time of such illegal detention."

"The arrest and detention of the plaintiff at Battle Creek having been illegal, as I have charged you, and it being conceded by the defendant that the plaintiff was not restored to his liberty before being taken into custody by Mr. Greenfield, I instruct you that the illegal character of the detention continued until the arraignment of the plaintiff in the recorder's court of this city on the forenoon of April 26, 1901."

"An officer, in making an arrest, should avoid unnecessary harshness or violence. He has no right to use handcuffs, unless, in his honest judgment, under all the circumstances of the case, he is apprehensive of the escape of his prisoner if he does not use them. In this case, under the proofs offered by the defendant himself, I charge you that no justification is shown for handcuffing the young men together, and the act of doing so constituted an unjustifiable assault upon the plaintiff, for which defendant is liable to him in damages."

"Now, I feel warranted in instructing you, as a matter of law, in this case, that the injury complained of is not technical, but real. The illegal deprivation of liberty in this case, and the illegal imposition of handcuffs, were real personal injuries, and require that you award plaintiff something more than nominal damages. How much more, it is for you to say, in the exercise of your best judgment. I can only say that it should be such a sum as will fairly and fully compensate him for the injuries received. Beyond such a sum you should not go, nor should you stop short of that."

The jury returned a verdict for $50. The case is brought here by writ of error.

The first question presented is, Was the arrest at Battle Creek by the direction of the defendant illegal, when the warrant was in the possession of the defendant at Kalamazoo? In the case of *People* v. *McLean*, 68 Mich. 480 (36 N. W. 231), it was said:

"McLean was charged simply with a misdemeanor, and he could not be arrested for the crime, after the commission of the act, without a proper warrant. The war-

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rant was issued and delivered to the sheriff. The sheriff is authorized to take such assistance with him in making an arrest as he may deem necessary, and the warrant in his possession, while present and pursuing his object, will be a justification to his assistants in making the arrest. But he has no authority to send an undersheriff or deputy to one place to make an arrest without a warrant, while he goes to another for the same purpose with the warrant. He cannot send his deputy into one town or county while he gives pursuit in another. Under the ancient practice of hue and cry, before warrants were issued, this might be done in the pursuit of felons, but no hue and cry could be raised for a misdemeanor. We think it clear that, in cases of misdemeanors, the sheriff must be present, either in sight or hearing, directing the arrest, to justify a person not armed with the warrant to make the arrest."

See, also, *Drennan* v. *People*, 10 Mich. 184; *People* v. *Johnson*, 86 Mich. 175 (48 N. W. 870, 13 L. R. A. 163, 24 Am. St. Rep. 116); *Smith* v. *Clark*, 53 N. J. Law, 197 (21 Atl. 491).

It is claimed by defendant that as the plaintiff, when arraigned, made no objection to the manner of his arrest, but pleaded guilty to the charge, by so doing he waived any irregularity in the arrest, and cannot recover. The authorities upon this proposition are not harmonious. In 12 Am. & Eng. Enc. Law (2d Ed.), p. 743, it is said:

"It has been held by a court of high authority that a party cannot maintain a civil action for damages for false imprisonment where his arrest has been followed by conviction in a criminal court, and that conviction remains unreversed, unless such person establishes the fact that his conviction was obtained by fraud and conspiracy. But it is believed that this means no more than that, where there has been an arrest without warrant, conviction on the charge is, in general, *prima facie* evidence of probable cause. If more than this is intended, it is contrary to the weight of a majority of the best-considered cases. Indeed, the converse of the proposition, it would seem, has been expressly denied in the same State, viz., where there has been an arrest without warrant, a discharge by the police justice is *prima facie* evidence of want of probable cause."

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See, also, cases cited in the notes.

We think the weight of authority does not favor the conclusion that the liability for the illegal arrest is waived by pleading guilty to the offense charged in the warrant. Did the court err in holding that, after defendant personally took plaintiff into custody, his warrant did not protect him from that time until the plea of guilty was entered? There is a dearth of decisions in point, and the authorities upon this proposition are also disagreed. The case of *Mandeville* v. *Guernsey*, 51 Barb. 99, cited in support of the charge of the court, was one where a sheriff from the State of Pennsylvania arrested the accused in the State of New York, and carried him into the State of Pennsylvania. The court held that not only did the sheriff have no authority to make the arrest in New York, but that he committed an offense against the laws of the State of New York when he removed the prisoner to the State of Pennsylvania. The case is very different from the one at bar. In that case the accused was beyond the reach of the process of arrest, and could be lawfully brought within the jurisdiction of the court issuing the warrant only by obtaining the requisition of the governor of Pennsylvania. In the case at bar the plaintiff was within the reach of process, and might be arrested by any person having a lawful warrant. The case was removed to the court of appeals (50 N. Y. 669), and affirmed by a divided court. No opinion was filed.

In *Cabell* v. *Arnold*, (Tex. Civ. App.) 22 S. W. 62, where an illegal arrest had been made, and the accused was afterwards delivered to an officer having a legal warrant, a judgment for damages for the illegal detention of the accused to the time he was delivered to the officer having the warrant was sustained.

Many of the cases cited by counsel are civil cases, in which a different rule obtains than the one applicable to criminal cases.

In *Holley* v. *Mix*, 3 Wend. 350 (20 Am. Dec. 702), it is said:

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"The warrant against John Doe did not authorize the arrest of any person other than John Doe. It was altered by inserting the name of the present plaintiff, and then it was a justification for all subsequent regular acts of all concerned in its execution."

In *Harris* v. *McReynolds*, 10 Colo. App. 532 (51 Pac. 1016), which was an action for false imprisonment, the court used the following language:

"But it is contended for the defendant that the false imprisonment of the plaintiff lasted only from the time of his arrest at the verbal direction of the defendant until the making of the complaint and the issue of the warrant, and that his detention in custody afterwards was not false imprisonment. The court was requested to so instruct the jury, but the request was refused, and error is assigned upon the refusal. If the process by which it was assumed to hold the plaintiff in custody was valid process against him, the instruction should have been given."

As before stated, the plaintiff, when taken into custody in the first instance, was within the jurisdiction of the court issuing the process. If the defendant in person had made the arrest, instead of procuring it to be made by a police officer at Battle Creek, it would have been a valid arrest; or if no arrest had been made in fact until the defendant took the plaintiff into custody, its validity could not have been questioned. I think it unreasonable to say that, because the first arrest was invalid, the second one was also invalid, and that the jury should have been instructed that plaintiff could recover damages only to the time of the lawful arrest.

Did the trial judge correctly instruct the jury in relation to putting the handcuffs upon the plaintiff? The record does not disclose any undue harshness or discourtesy done to the plaintiff by the officer, unless putting the handcuffs upon him is to be so regarded. In *Firestone* v. *Rice*, 71 Mich. 377 (38 N. W. 885, 15 Am. St. Rep. 266), it is said:

"The sheriff cannot stop when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of

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the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable and right."

See, also, *Butler* v. *Washburn*, 25 N. H. 257.

The officer had two prisoners, who were strangers to him, under arrest. It was long after dark. He had a considerable distance to go with them. It was his duty to follow the mandate of his warrant. There was nothing in his conduct to indicate wantonness or malice, and the jury should have been so instructed, and that they should not find any additional damages because the prisoners were handcuffed.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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ST. MARY'S POWER CO. *v.* CHANDLER-DUNBAR WATER-POWER CO.

1. TAX TITLES—ADVERSE POSSESSION—STATUTE OF LIMITATIONS—DUE PROCESS OF LAW.

Section 115 of the tax law of 1885 (Act No. 153, Pub. Acts 1885) provides that, after a claimant under a tax deed issued by virtue of said act shall have been in actual possession of the premises for five years, he shall be conclusively deemed the owner in fee. Section 116 provides that no action shall be brought against one claiming under a deed so issued after the expiration of five years from the time when the right of action accrued. *Held*, to constitute a statute of limitation, and hence not open to the objection of taking property without due process of law.

2. SAME—TITLE TO ACT—SUFFICIENCY.

The provisions of the tax law of 1885 (sections 115, 116), fixing

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a five-year limitation on actions to recover land from claimants under tax deeds, were fairly within the object expressed in its title, viz., "An act to provide for the assessment of property, and the levy and collection of taxes thereon."

3. SAME—REPEAL OF STATUTE.

The provisions in question were not repealed by the amendment of 1889 (Act No. 8, Pub. Acts 1889) to the general statute of limitations (2 How. Stat. § 8698), the same having made no change in the subdivision relating to actions against claimants under tax deeds.

4. SAME.

Nor were such provisions repealed by the tax law of 1889 (Act No. 195, Pub. Acts 1889), which, while in the nature of a general revision, and not expressly re-enacting such provisions, by its terms repealed only such acts and parts of acts as were inconsistent therewith.

5. SAME.

Subsequent legislation examined, and found to contain nothing inconsistent with the provisions in question.

6. SAME—CONSTRUCTION OF STATUTE.

The provision of section 66 of the tax law of 1889, that no sale should be set aside after the purchaser had been in actual possession for five years, did not operate as a limitation on rights of action.

7. SAME.

The similar provision of section 73 of the tax law of 1893 (Act No. 206, Pub. Acts 1893) is in terms limited to sales under that act.

8. SAME—TENANCY IN COMMON—PRESUMPTIONS.

There is no presumption that a purchase at a tax sale by a tenant in common was made for the benefit of his co-tenant, where their interests were acquired at different times, and the taxes were a lien on the lands when the purchasing tenant obtained his original title.

9. TRIAL—DIRECTING VERDICT—QUESTIONS FOR JURY—WAIVER.

Where, at the close of the testimony in a case, each party claimed that a verdict should be directed in his favor, and the court said to the jury that it seemed to be agreed that it was the court's duty to direct a verdict one way or the other, to which statement no exception was taken, the defeated party could not urge on appeal that there were questions of fact on which he was entitled to go to the jury.

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Error to Marquette; Stone, J. Submitted February 18, 1903. (Docket No. 86.) Decided June 23, 1903.

Ejectment by the St. Mary's Power Company against the Chandler-Dunbar Water-Power Company and the Edison-Sault Electric Company. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Shaw, Warren, Cady & Oakes (*Dan H. Ball* and *E. S. B. Sutton*, of counsel), for appellant.

Moore & Goff (*A. B. Eldredge* and *Sharpe & Handy*, of counsel), for appellees.

HOOKER, C. J. In an action of ejectment, a verdict was directed in favor of the defendants. Judgment followed, and the plaintiff took a writ of error.

The premises consist of the undivided half of a small parcel of land bordering upon the shore of the St. Mary's river, called "Private Land Claim No. 95," at Sault Ste. Marie, Michigan. It adjoins private claim No. 96, which also borders upon the river. This parcel was patented by the federal government to Sheldon McKnight in 1814. Sheldon McKnight died prior to 1880, leaving two sons, who were his only heirs, named, respectively, Charles A. and Lucius L. McKnight.

Defendant's Paper Title: Lucius L. conveyed by quitclaim deed all of claim 95 to Scranton on May 4, 1887. There is no proof as to the date of the delivery of this deed, but it was acknowledged January 22, 1889. On December 23, 1889, a tax deed was executed by the auditor general to Scranton for claim 95, for delinquent taxes, upon a sale held October 2, 1888. On March 23, 1893, Scranton gave a warranty deed of the premises to the defendant the Chandler-Dunbar Water-Power Company. It is admitted that the tax deed was invalid.

Plaintiff's Title: On June 11, 1900, Charles A. McKnight made a deed whereby he conveyed and quitclaimed

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all his interest as heir at law of Sheldon McKnight in the premises to Cady. Cady conveyed the same to the plaintiff by deed dated August 19, 1901.

It thus appears that Cady and defendant held the original title in common,—each a moiety.

Adverse Possession: The defendant claims title to the entire premises, one-half by virtue of the deed from Lucius, and the other by virtue of alleged possession for the statutory period under the tax deed.

The two important questions in the case are: (1) Is there a valid five-year statute of limitations applicable to this case? (2) Does the testimony upon the subject of possession raise an issue of fact that should have been submitted to the jury? Incidental to these questions is a third, viz.: Were the parties tenants in common, and, if so, does that fact affect defendant's rights under the statute?

It is essential to the affirmance of the judgment that we be able to sustain the defendant's claim that there is a valid five-year limitation of action against one occupying under a tax deed. It is clear that defendant entered under the tax deed, as to the undivided half of the premises. This deed was issued under the law of 1885. At the time this act was passed, the general statute of limitations (2 How. Stat. § 8698) prescribed a period of ten years within which actions for the recovery of the possession of land should be brought against defendants claiming title under tax deeds. Section 115 of the tax law of 1885 (Act No. 153, Pub. Acts 1885) is as follows:

"SEC. 115. The right to recover possession of any land by any person claiming through or under any deed executed by the auditor general by virtue of the provisions of this act shall be forever barred by the actual, open, and continuous possession of any person claiming such land adversely to such tax deed for the period of five years after the execution of such tax deed: *Provided*, that if the person claiming through or under such tax deed shall have once taken actual and peaceable possession of such land by virtue of his deed, and shall have continued in

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such actual possession for five years next thereafter, then the provisions of this section shall not apply, but in such case he shall be conclusively deemed the owner in fee simple of such land."

Counsel contend that this provision is not a statute of limitation, but was an attempt to make the deed conclusive evidence of title, and that it is invalid under the decision in the case of *Groesbeck* v. *Seeley*, 13 Mich. 329. This statute differs from the one involved in that case, in the particular of possession. See Act No. 32, Laws 1858. It attempted to make the bid to the State effective to devest a title, while in the statute under discussion the title was made to depend upon the possession taken and held for the statutory period. In the former case the court said that the statute was not a statute of limitations. We have no hesitancy in saying that the later statute is a statute of limitations. The provision that, in case actual and continuous possession shall be taken and maintained for five years under such a deed, the person so occupying "shall be conclusively deemed the owner in fee simple of said land," is equivalent to fixing a period at the expiration of which title should vest by adverse possession; and such statutes are treated as statutes of limitation, which they are in fact. *Sparrow* v. *Hovey*, 44 Mich. 63 (6 N. W. 93); *McKenzie* v. *A. P. Cook Co.*, 113 Mich. 452 (71 N. W. 868); *Spaulding* v. *O'Connor*, 119 Mich. 45 (77 N. W. 323); *Boynton* v. *Veldman*, 131 Mich. 555 (91 N. W. 1022); *Commissioner of State Land Office* v. *Auditor General*, 131 Mich. 147 (91 N. W. 153).

But this is expressly made a statute of limitations by section 116.

"SEC. 116. No person shall bring or maintain any action for the recovery of any land or the possession thereof, or make any entry thereupon, unless such action is commenced or entry made within five years after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims, when the defendant claims title under a deed made by the auditor general in pursuance of the provisions of this act." Act No. 153, Pub. Acts 1885.

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It is also urged that the provision is void for the reason that it is not germane to the title. In our opinion, this provision is an assurance well calculated to induce confidence in tax sales, and therefore within the rule.

Counsel contend further that sections 115 and 116 of the law of 1885 have been repealed (1) by amendment of section 8698, 2 How. Stat., being 3 Comp. Laws, § 9714; (2) by revision of the tax law.

At the session of 1889, Act No. 8 was passed, and approved February 25th. It amended 2 How. Stat. § 8698, by adding a few words relating to sales on foreclosure to subdivision 1 of the section, but making no change in subdivision 2, which alone is applicable to this case. We think that it was not designed to repeal sections 115 and 116, and should not be given such effect.

An act approved June 27th, which was given immediate effect (being Act No. 195, Pub. Acts 1889), was entitled "An act to provide for the assessment of property and the levy of taxes thereon, and for the collection of taxes heretofore or hereafter levied." This statute provided a new and different method for foreclosing the tax liens of the State than any theretofore in vogue. A judicial decree was provided for before sale. Sections 115 and 116 of the law of 1885 were not re-enacted, but section 66 contains the following provision:

"All sales shall stand confirmed, subject to the right of redemption provided for in section sixty-four, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of any order or further notice. The practice with reference to setting aside such sale shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages: *Provided*, no sale shall be set aside for inadequacy of price, except upon payment of amount bid upon such sale, with interest and costs: *And provided further*, that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. In such cases the owner of such lands may move the court, at any time within one year after he shall have notice of such sale, to set the same

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aside, and the court may so order upon such terms as may be just: *Provided*, also, that no sale shall be set aside after the purchaser, his heirs or assigns, has been in actual possession of the lands for five years. If a sale is set aside, the county treasurer shall refund to the purchaser the amount of his bid, with interest at seven per cent., together with the taxes which have been paid by him since said sale, and interest thereon at seven per cent. from date of payment."

It did not in terms repeal the old law, but repealed all acts and parts of acts in any way contravening its provisions.

The law of 1889 was repealed in 1891, but section 66 of the law of 1889 was re-enacted without substantial change. See Act No. 200, Pub. Acts 1891, § 67.

The law of 1891 was repealed in 1893 by Act No. 206. Section 70 provides:

"All sales shall stand confirmed, subject to the right of redemption provided for in section seventy-four, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of an order or further notice. The practice with reference to setting aside such sale shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages: *Provided*, no sale shall be set aside for inadequacy of price, except upon payment of amount bid upon such sale, with interest and costs: *And provided further*, that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. In such cases the owner of such lands may move the court, at any time within one year after he shall have notice of such sale, to set the same aside, and the court may so order upon such terms as may be just."

Section 73 provides:

"No sale of any lands or deed made by the auditor general under the provisions of this act shall be set aside or annulled by any court of this State after the purchaser, his heirs or assigns, have been in actual and undisputed possession of such lands so sold or conveyed for a period of five years from the date of such purchase or deed."

It will be noticed that an important proviso of section 66 was omitted in this act.

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We had occasion to review these two sections (70 and 73) of the law of 1893 in the case of *Spaulding* v. *O'Connor*, 119 Mich. 48 (77 N. W. 323). That case arose upon a petition to review tax foreclosure proceedings, and to set aside the sale, under section 70. The circuit court set aside the sale and deed. This court reversed the decree, and held that the petition was not seasonably filed under the statute (section 70). It was said that this section was designed to limit the power inherent in a court of chancery to set aside its sales when application is made in the same proceeding. That this section should be limited to such object, and not be given the effect of a statute of limitation generally, is manifest, especially in view of the fact that the legislature omitted from the section the following words of the corresponding section of the old law, viz.:

"*Provided*, also, that no sale shall be set aside after the purchaser, his heirs or assigns, has been in actual possession of the lands for five years."

In the same connection, we may mention section 73, which contains a clear limitation, as is said in *Spaulding* v. *O'Connor*.

If, as contended by counsel for the defendant, sections 115 and 116 of the law of 1885 were substantially re-enacted in section 66 of the law of 1889 and section 67 of the law of 1891, they fell with the rest of those acts by the explicit repeal in 1893. We are not cited to any case in which it has been intimated that section 66 was intended as a statute of limitation, except as to proceedings in the foreclosure case, and therefore, unless it can be said that sections 115 and 116 of the law of 1885 are still in force, or the case is within section 73 of the law of 1893, the defendant's claim that five years' possession bars recovery in this case cannot prevail. Section 73 applies only to sales under the act of 1893. It is probably true that we might hold that such portions of the law of 1885 as had been re-enacted in 1889 were not repealed, where necessary to make the latter act effective, under the cases of *Davenport* v.

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Auditor General, 70 Mich. 192 (38 N. W. 211), and *Humphrey* v. *Auditor General*, 70 Mich. 292 (38 N. W. 214). That, however, is a radically different proposition from that of saying that there is still vitality in certain sections of that act for the reason that they are not inconsistent with acts subsequently passed, although not reenacted. These various acts were evidently intended as revisions of the tax laws, and, under a well-known rule, such acts are usually held to supersede previously existing laws. Suth. Stat. Const. §§ 154–156; *Bartlet* v. *King*, 12 Mass. 545 (7 Am. Dec. 99). This cannot be said, however, if a contrary legislative intent is deducible; and this is deducible where, instead of repealing an act, the repeal is only of such acts and parts of acts as are inconsistent with the new legislation. See Endl. Interp. Stat. § 203, and notes; Suth. Stat. Const. § 155, and cases cited. See, also, *Campau* v. *City of Detroit*, 14 Mich. 276. We conclude, therefore, that, the law of 1889 not having repealed the provisions of sections 115 and 116, and none of the subsequent acts being inconsistent with them, they are applicable in this case.

The circumstances shown by the testimony are sufficient to establish a *prima facie* case of adverse possession, and we think defendant's relations with the owner of the other moiety were not such as to impose a duty to pay taxes for his benefit, or to create the presumption that the purchase was upon his behalf or for his benefit. The question of possession was one which the plaintiff was entitled to go to the jury upon. Each party claimed that a verdict should be directed in its favor. The plaintiff requested the court to charge that, "as the defendant was a tenant in common with the pliantiff and its grantor during the time defendant claims to have had possession of the property, there was no evidence that the defendant held adversely to the plaintiff and its grantor, or, at least, no evidence that the plaintiff or its grantor had ever been notified that said defendant claimed to hold adversely." Thereupon the court instructed the jury as follows:

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"We have listened to a pretty lengthy argument in this case, upon the law, of both parties, and both parties seem to agree that it is the duty of the court to direct a verdict in this case; the plaintiff insisting that it is the duty of the court to direct a verdict in its favor, and the defendants claim that it is the duty of the court to direct a verdict in their favor. They do not agree, of course, upon the propositions of law at all."

It does not appear that an exception was taken at the time, or that the court was informed that he was in error in understanding that plaintiff did not claim the right to go to the jury on the question of fact. The plaintiff owed it to the judge to set him right about this, if he was wrong, and, not having done so, cannot now ask a reversal upon that ground. *Wolf* v. *Holton*, 110 Mich. 168 (67 N. W. 1082); *Ranson* v. *Weston*, 110 Mich. 243 (68 N. W. 152); *Farmers' Mut. Fire-Ins. Co.* v. *Gargett*, 42 Mich. 295 (3 N. W. 954).

Several other questions were raised in relation to the admission of testimony, but we find no error in them.

The judgment is affirmed.

The other Justices concurred.

FURBUSH *v.* MARYLAND CASUALTY CO.

1. APPEAL—REMARKS OF COURT—EXCEPTIONS.
   A party who took no exception to a remark made by the trial court on overruling an objection to testimony interposed by the opposite party could not complain of the remark on appeal.

2. ACCIDENT INSURANCE—SUICIDE—QUESTION FOR JURY.
   Evidence in an action on an accident policy examined, and *held* to raise a question for the jury as to whether insured came to his death through homicide or suicide.

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3. SAME—PRESUMPTIONS—INSTRUCTIONS.

In an action on an accident policy, in which it was apparent that insured either committed suicide or was murdered, defendant could not complain of an instruction that the presumption of the law was against suicide, where its own requests to charge were based upon that theory.

Error to Alpena; Emerick, J. Submitted February 24, 1903. (Docket No. 152.) Decided June 23, 1903.

Assumpsit by Louesa C. Furbush against the Maryland Casualty Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Charles R. Henry, for appellant.

R. J. Kelley, for appellee.

MOORE, J. February 3, 1900, George M. Furbush obtained from the defendant company an accident insurance policy, running for one year, for the sum of $5,000, in favor of his wife, the plaintiff. In the forenoon of the 1st of December following, Mr. Furbush was found by the side of the public highway, lying upon his back, dead. The defendant declined to pay the amount of the insurance, claiming Mr. Furbush had committed suicide. The case was tried before a jury, who returned a verdict for the full amount of the insurance. The case is brought here by writ of error.

This is the second time the case has been in this court. It is reported in 131 Mich. 234 (91 N. W. 135). A reference to the opinion in that case will aid in understanding the questions presented here. Upon the first trial the circuit judge allowed witnesses, sworn on the part of the plaintiff, to express opinions in relation to certain phases of the testimony. We thought the witnesses should state facts instead of conclusions, leaving to the jury the duty of drawing the conclusions from the facts. Upon the first trial the defendant sought to show the insured was in straitened pecuniary circumstances, and was of intemper-

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ate habits. This testimony was, we thought, improperly excluded, and for these reasons the judgment was set aside and a new trial ordered. Upon the second trial the objectionable testimony offered by the plaintiff on the first trial was not received, and the defendant was allowed to put in such proof as it offered bearing upon the habits and financial condition of Mr. Furbush.

The first question calling for discussion is, Did the trial judge err in some comments he made in passing upon an objection made by the attorney for the plaintiff to a question put to a witness by the attorney for the defendant? The record shows the court overruled the objection, and the witness answered the question. The attorney for the plaintiff excepted to the ruling. The attorney for the defendant made no suggestion to the judge that he was dissatisfied with the ruling or the remarks of the judge, and took no exceptions to what he said. Under these circumstances, the question is not open for review in this court.

Error is assigned to the closing argument made by the attorney for the plaintiff. It would not be profitable to set out this argument here. We have examined it with care, in connection with the defense which was interposed and the testimony offered to support the defense. We are all agreed we are not able to say the argument, if objectionable, was sufficiently so to justify us in reversing the case for that reason.

It is insisted upon the part of the defendant a verdict should have been directed in its favor. It is claimed the insured was a hard drinker, that he was financially embarrassed, that he was despondent, and that all the evidence pointed to suicide as the only explanation of his death.

On the part of the plaintiff it is claimed the evidence shows the following. We quote from the brief of counsel:

"The plaintiff had shown that the insured, her husband, was in the prime of life, 40 years of age, in good health, and always had been; that he was active, energetic, and attentive to his business; that at no time prior to his

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death had he manifested by act or word any unusual condition of mind or body; that, on the day prior to his death, he was engaged in his usual business, dictating and writing many letters to his customers; that he informed his brother-in-law, on the evening before his death, of his intended trip to Washburn for the purpose of transacting business with the Bigelow Lumber Company; that he returned home that evening about 7 o'clock, told his wife of his intended trip the next morning, and that he would return before noon; that he partook of an early breakfast and left his home on the morning of his death, bidding his wife good-by in his usual and accustomed manner; that he went to a livery stable, secured a horse and cutter, and started for Washburn between 6 and 7 o'clock; that on his way out of the city of Ashland he met a friend, and invited him to take a ride with him to Washburn, saying that he would return before noon. He is next found at Washburn, some 12 or 14 miles from Ashland, transacting business with the Bigelow Lumber Company, and, as testified by Mr. Hartshorn, he was in his usual good spirits, and nothing unusual was observed in his actions or conversation. After concluding his business with the Bigelow Lumber Company, he leaves their office between 9 and 10 o'clock in the morning on his return, and a few hours later his body is found about six miles from Washburn, at the roadside, on a bridge over a depression or gully, with a gunshot wound in his head which caused his death. The bullet entered above and behind the right ear; the body lay flat on its back, with his buffalo overcoat, coat, vest, shirts, and underclothes all unbuttoned and thrown open; his right hand was stretched out on the snow; several witnesses who first saw the body did not discover any revolver, but subsequently a revolver was found in the snow near his left elbow; there had been one shot fired out of it; there were two footprints near the head, and no other tracks or impressions in the snow about the body; the body lay straight out, and the coats were drawn down smoothly under it; there was a glove on the right hand, and the one on the left hand partly pulled off; a watch, a five-dollar bill, and some change was found on the body. The horse and cutter which deceased had been driving was caught at Nash, about two miles from where the body was found; a large pocketbook which deceased usually carried in his inside breast pocket, and used for bills and money when he had a con-

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siderable amount, was found in the cutter, between the dash-board and foot-rest, open, and contents gone. There were no indications in the snow where the body lay of any struggle, as it had hardly made an impression, although the snow was quite soft; the revolver found near the body had never been seen in the possession of the deceased; the place where the body was found was several miles from any habitation; there was no eyewitness or direct evidence as to how the fatal shot was fired."

And counsel claims the death is not accounted for upon the theory of suicide.

The same question was presented to us by the former record. See 131 Mich. 234 (91 N. W. 135). We were of the opinion then, and are now, that the case was one for the jury.

The remaining question calling for discussion relates to the charge of the court. We quote enough from it to present the question:

"The plaintiff has the burden of proving, in order to entitle her to a verdict at your hands, that this death was occasioned through injuries which were external, violent, and from accidental means. And when I say that the plaintiff has the burden of proving that fact, she has that burden under the rule established in all civil actions, which is simply that she maintain that issue by a fair preponderance or weight of the evidence. In a civil case —and this is a civil case—the plaintiff is obliged to sustain the contention upon her part, and the issues upon the facts which she is required to prove, by the fair weight or preponderance of the evidence, which means such weight of the proof as overbalances and prevails against everything that is brought against it; such a fair weight and preponderance of the evidence as overbears everything that may be opposed to it, and which satisfies your minds fairly of the truth of the proposed issue."

"I charge you that if the death of George M. Furbush upon the 1st day of December, 1900, was caused by a bullet fired from a revolver in the hands of a third person, and fired intentionally by that third person, and that this shooting was not brought about by any act or doing of the deceased, and for which he was in no way responsible, it would be caused by means which are violent, external,

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and accidental, and within the meaning of this policy, and, I will add, within the meaning of this question No. 1."

"Now, I stated a few moments ago that the plaintiff had the burden of proving before you that this was an accidental death within the meaning of this policy, and I say here to you that she still has the burden under this policy of proving that this was not a suicide; but I charge you, gentlemen of the jury, in that connection, that the law presumes that this was not suicide, from the mere fact alone of the death or finding of this body in the road. From that fact alone, with the bullet wound in the head, the law presumes that it was not a case of suicide. That presumption supplies the burden of proof which the plaintiff is required to make upon that point; and if that is all there was of the case—if that is all there was of the case, the mere fact of the dead body and the bullet wound and death—the presumption of law would be that it was something else than suicide.

"Now, this is a presumption, however, that may be overcome by evidence; it may be rebutted. It stands as a controlling factor of the case upon that point, however, until it is overcome. But if you should believe from the evidence in the case that Mr. Furbush came to his death by his own hand,—if you should be satisfied, by the fair weight and preponderance of the evidence in this case, that George M. Furbush took his own life,—then this presumption which the law makes against suicide would be overcome, and the plaintiff would not be entitled to recover."

"Now, gentlemen, in considering the issue upon that point, you have recourse, and you are remitted to, and you are to consider, all the evidence in the case, and such circumstances as counsel upon each side have been able to present to you, and which have been put here in evidence. Consider the position of the body and the clothing, and the condition of the body and the clothing, and the wound itelf, and all the facts and circumstances which are known and which have been proven here, and the surroundings; his mission and business upon the day in question; his business affairs; his social and domestic affairs, and his habits, and health or want of health; everything which has been allowed in the evidence here in this case you are to consider as bearing upon that issue,—that is to say, upon the issue as to whether he killed himself; and the presumption of law is that it was not a case of suicide,—

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that he died from some other reason; and, unless you are able to say that, from the fair weight and preponderance of the evidence in the case, you believe he took his own life, then the plaintiff would be entitled to recover."

Counsel says that:

"The only reason why the courts have said that, if a man is found dead, the presumption is that he did not kill himself, is because ordinarily men do not kill themselves. The same law that created the presumption against suicide for the very same reason makes the presumption to exist against homicide, and very rightfully, too. It is no more contrary to the laws of humanity and of the common experience of men for one to kill himself than it is for another to take his life. Suicide is quite as common as murder. At least, suicide is not presumed for the very same reason that murder is not presumed."

It is argued that as the defendant claims it is a case of suicide, while plaintiff claims it is a case of murder, it cannot be said the presumption of murder arises in this case from the fact that Mr. Furbush was found dead from a bullet wound. This is a view of the law not presented in the court below. The defendant preferred the following requests:

"In this case the burden is on the plaintiff, Louesa C. Furbush, of proving that George M. Furbush came to his death by reason of external, violent, and accidental means, and this must be established, to entitle the plaintiff to recover, by a fair preponderance of all of the evidence."

"That, while the presumption is that the deceased did not commit suicide, yet this is a presumption only, which can be overcome by evidence."

"If you find that the preponderance of evidence is that the deceased, George M. Furbush, came to his death by his own act, then you must find in favor of the defendant."

We have already quoted sufficiently from the charge of the court to show that the substance of each of these requests was given. It was the claim of plaintiff that the death of Mr. Furbush was accidental, within the meaning of the terms of the policy. It was claimed by way of

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defense that Mr. Furbush committed suicide. The trial court gave the substance of the requests of the defendant as to the burden of proof, which presented its theory of that branch of the case. The defendant has no occasion to complain of that portion of the charge. See *Travelers' Ins. Co.* v. *Nicklas*, 88 Md. 470 (41 Atl. 906), and the cases therein cited; *Burnham* v. *Casualty Co.*, 117 Mich. 142 (75 N. W. 445).

The other assignments of error have been examined. We do not deem it necessary to discuss them. The case was tried with care, and we do not discover in it any reversible error.

Judgment is affirmed.

The other Justices concurred.

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BOUTELL *v.* MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

One who was struck by the engine of a passenger train as he stepped upon the track at a crossing was guilty of contributory negligence, precluding a recovery for the injury, where, though the gates were not lowered nor the engine bell rung, he knew that the train had stopped at the depot near by, and was likely to start at any moment, and in fact heard the noise of the engine, but, supposing it to come from another engine some distance away, hurried on to meet a friend, without looking to see whether the train was approaching.

Error to Washtenaw; Kinne, J. Submitted April 9, 1903. (Docket No. 26.) Decided June 23, 1903.

Case by Hiram Boutell against the Michigan Central Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

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In the city of Ypsilanti, River street runs north and south, and Cross street east and west, the two intersecting where the tracks of the defendant cross them. Its roadbed runs northwesterly and southeasterly. The passenger depot is located westerly of Cross street, but at what distance does not appear. A power house is located on the south side of Cross street and east of River street. On the west side of River street and north of Cross street was located the gatekeeper's house. Defendant had three gates, one on Cross street west of its tracks, and two on River street, located respectively north and south of its tracks. At the place where plaintiff was injured, there were four tracks,—two main tracks and two side tracks. The situation can be better understood from the accompanying diagram, prepared by counsel for defendant as a part of their argument. While plaintiff's counsel insists that it is not strictly accurate, it is sufficiently so for the purpose intended.

Plaintiff was employed as fireman at the power house, coming off duty about 6 o'clock in the evening. He was required to lock the door of the power house when leaving, walk to the gatekeeper's house, and hang the key up inside. He did this on the occasion in question. One of defendant's heavy and regular fast passenger trains had come in from the west, on the south main track, and stopped with its engine standing west of and near to Cross street. The engine was a very large, 10-wheel engine, and the engineer could not see a man upon the track unless he was 100 feet ahead of the engine, and he did not see the plaintiff, who was evidently within less than 100 feet when the train started. The train was moving on an up grade of about 25 feet to the mile, and the fireman was engaged in shoveling coal into the firebox. The train stopped just long enough to permit passengers to get off and on, and to take off and put on baggage. It was the duty of the gatekeeper to lower these gates in time to warn travelers upon the highway of the approach of this train.

On leaving his work on the 1st day of March, 1901,

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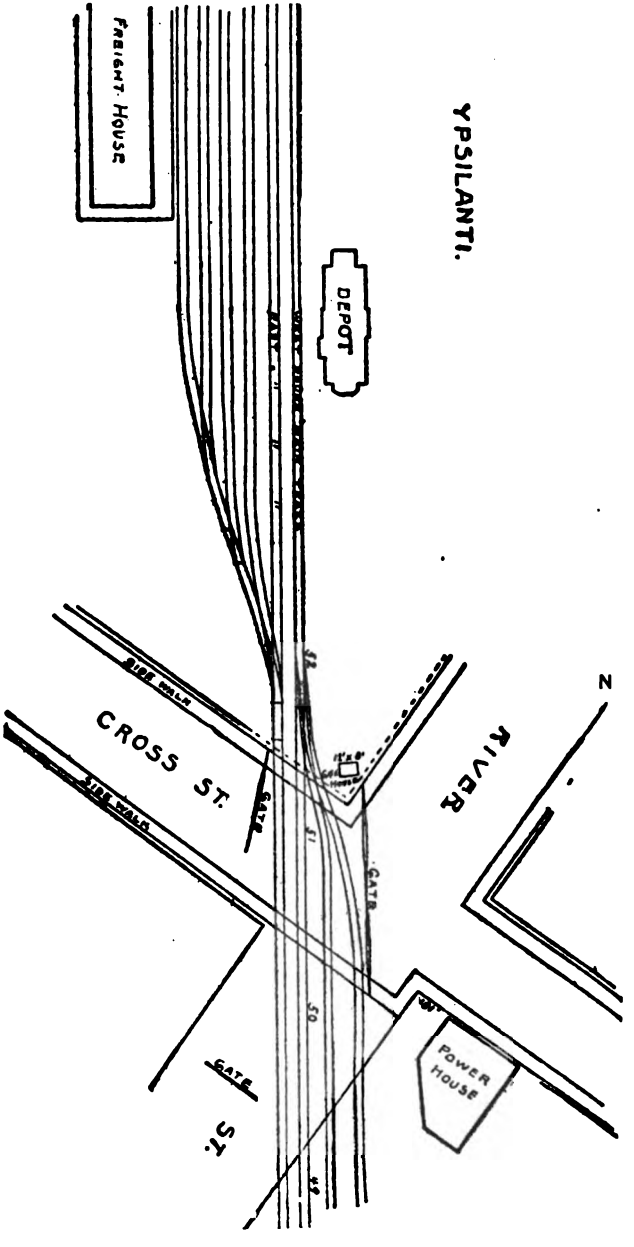

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plaintiff locked the door of the power house, carrying two bundles, walked out onto Cross street, and diagonally across River street to the gatekeeper's house, which was located about 15 feet from the sidewalk, hung the key up inside, and started for home. The night was cold. He turned up his overcoat collar, pulled his cap over his ears, and started down and diagonally across the intersection of River and Cross streets to River street, his home being in that direction. He desired to reach the east side of River street. When at about the center of River street, he stepped over the north rail of the south track, was struck by the cowcatcher of the engine of the approaching passenger train, and was injured. The negligence charged is failure to ring the bell and lower the gates. Plaintiff recovered verdict and judgment.

The two defenses insisted upon by the defendant are that the gatekeeper was a fellow-servant with the plaintiff, and that the plaintiff was guilty of contributory negligence.

Plaintiff, on direct examination, testified as follows:

"I live on the south side of the railroad track. I had to cross the railroad track to go home from where I had been employed all day. This gate is on the north side of the track, and I started across the track, the gate being back from River street about 15 feet. I struck a little crosswise course across the street. I calculated to take the east side of River street down to the foundry. There is a little alley there, which I generally cut through, to get home quicker. It cuts off a little. This train was No. 10, going east. It usually stops about five minutes. It pulled in just as I was going across the street to leave the key, and as I went right on, minding my own business, going a little diagonally across the track there, about the center of River street, as near as I can remember, the cowcatcher struck me on the ankles and threw me up."

His testimony as to the gates was as follows:

"*Q.* At the time you were struck with the cars, state where the gates were.

"*A.* They were— I think they were up. They were up, I know, because, when I came across from the electric-light house, if the gate had been down, I would have to go around or crawl under it, and I did not do either.

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"*Q.* When you came back from the gatehouse, going towards River street, crossing the railroad, where were the gates then?

"*A.* They were up then.

"*Q.* So, when the train struck you, the gates were where?

"*A.* They were up."

On cross-examination he testified:

"*Q.* At the time you left the power house, you saw the train there?

"*A.* Yes, sir.

"*Q.* The locomotive of the train?

"*A.* Yes, sir. * * *

"*Q.* Would there have been any difficulty in your seeing this engine where you were?

"*A.* I don't think there would.

"*Q.* What was it? One of the big engines?

"*A.* I think it was.

"*Q.* What did you have on that day,—a cap or a hat?

"*A.* I had a cap.

"*Q.* Did you have it pulled down over your ears?

"*A.* Yes, sir.

"*Q.* Do you think that interfered with your sense of hearing any?

"*A.* It might, a little.

"*Q.* Was it storming, or what was the weather?

"*A.* No; it was not storming.

"*Q.* It was simply cold?

"*A.* It was not so very cold; but I had been working inside long enough so I felt the changes of the weather when I went out.

"*Q.* Are you a little hard of hearing?

"*A.* I didn't know that I was.

"*Q.* There was a sidewalk, was there, on the south side of the railroad tracks, that you could have taken to go home?

"*A.* Yes, sir.

"*Q.* Why did you take the railroad track?

"*A.* I am telling you that I had to cross the railroad track to get on my side to get home, and I was crossing the track. Just down by Ferrier's foundry there is an alley. I used to go in across there to save a few rods.

"*Q.* Is it a shorter distance?

"*A.* Yes; a shorter distance.

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"*Q.* Instead of going on the sidewalk, you went this way to shorten the distance?

"*A.* Yes; to shorten the distance. * * *

"*Q.* During this time, did you turn around any to see if the engine was coming?

"*A.* I remember, when I started across, seeing a friend of mine standing in front of the cigar store, and I started to walk fast, and I don't think I turned around after that.

"*Q.* Then you did not look around?

"*A.* I don't think I did. * * *

"*Q.* If you had turned around at any time you were walking down this track, you could have stepped one side and got out of the way?

"*A.* Yes, sir. * * *

"*Q.* Did you hear any exhaust of steam when the locomotive started?

"*A.* There was a freight engine up in the yard that was making a terrible racket, and I did not pay— I supposed it was the freight that I heard, if I remember right. No, sir; I did not hear it.

"*Q.* You did not hear any exhaust from the engine?

"*A.* No; I did not.

"*Q.* What you did hear, you supposed was the freight engine, farther up in the yard?

"*A.* Yes; farther up in the yard."

Shortly after the accident, plaintiff made a written statement, which he testified was correct, and which is as follows:

"On the afternoon of March 1st, about 5:10, I left the power house of the Washtenaw Electric-Light Company, southeast corner of River and Cross streets, where I was employed as fireman by the Michigan Central Railroad Company. Saw train No. 10 standing at depot when I stepped out of the door. Thought I had plenty of time to cross railroad tracks before train would pull out. Pulled my cap down over my ears, and turned up collar of my overcoat, and started over walk, and down River street. Crossed over side track and north main track, and was just about stepping over north rail of south main track when I was struck by engine of train No. 10, and thrown down, rolling me over several times. I heard no bell or warning whatever. I did not think I was badly hurt at the time. Left foot felt numb, as though asleep. Got up

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and walked down the street as far as Congress street without help, where I found a man who took me home."

Plaintiff called one Grimson as a witness, who saw the accident. This witness testified that, when the accident actually occurred, the gates were down, but they were not down when plaintiff started across the track; that the train was nearly in the middle of Cross street when the gates came down. This witness was going across Cross street, west of the railroad crossing. He saw the plaintiff and the train. Witness was watching to see whether plaintiff was going to turn around and look. He undertook to "holler" to him, but the train was making so much noise that he could not hear, and he then started to run to him. It took about four seconds to lower the gates to a position where they were level with the ground.

Lawrence & Butterfield (*Ashley Pond* and *Henry Russel*, of counsel), for appellant.

Lee N. Brown, for appellee.

GRANT, J. (*after stating the facts*). We think the plaintiff was clearly guilty of contributory negligence. He heard the noise made by the engine and the train. He must have heard the exhaust of the steam. He testified he supposed that these noises were caused by another engine, farther away in the defendant's yard. He had no right to rely upon this supposition. He knew that the train was standing there when he left the power house, that it stopped only long enough to accommodate travelers in getting off and on, and that it was liable to start up any moment. The noise alone, even though the bell was not rung, was a sufficient warning to him. It was his duty to both listen and look. A turn of the head, which would require but a fraction of a second, would have shown him the train coming in close proximity to him. Instead of doing this, he stepped across the rail onto the track directly in front of the engine, which was approaching only a few feet from him.

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In *Brinker* v. *Railroad Co.*, 121 Mich. 283 (80 N. W. 28), where there were two roads running parallel and near each other, the plaintiff believed that the approaching train, the smoke of which he saw, was on the track farthest from him, and not upon the one which he was approaching. He was held guilty of contributory negligence. We said:

"It was his duty to stop and ascertain the road the train was on. * * * He was the master of his own movements, and slight precaution would have averted the accident."

It was equally the duty of the plaintiff in this case to stop, if necessary, and determine which train made the noise he heard. He was not safe if the noise came from the passenger train. He was safe if it came from the engine in the yard. A glance would have given him the necessary information. It was not dark. He testified that it was getting dusk, but admitted that there was no difficulty in seeing the engine and the train, and other objects around. A railroad track itself is notice of danger. This being so, it is the duty of every one attempting to cross to use ordinary precautions for his own safety. This plaintiff seeks to excuse the ordinary precaution to look by saying that he saw a friend, and he started to walk faster, and did not turn around to look, and that, if the gate towards which he was going had been lowered, he would have seen it. This case, in principle, is indentical with *Spaven* v. *Railway Co.*, 130 Mich. 579 (90 N. W. 325), and the language there used is equally applicable to the conduct of the plaintiff in this case.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

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ZIMMERMAN *v.* BOARD OF SUPERVISORS OF CHEBOYGAN CO.

1. PUBLIC HEALTH—CONTAGIOUS DISEASES—INDIGENT PATIENTS—SERVICES OF PHYSICIAN—LIABILITY OF COUNTY.

   A board of supervisors which has contracted with a physician, for a gross sum duly paid, to attend all indigent persons in a certain district who may, within a given time, be afflicted with diseases dangerous to the public health, cannot be compelled to pay again for the services of such physician, though claimed to have been rendered at the direction of a local board of health under 2 Comp. Laws, § 4424, which has allowed the bill therefor as a claim against the county.

2. SAME—DEFENSES.

   Where accounts for supplies furnished and services rendered to indigent persons afflicted with contagious diseases have been allowed by a local board of health, under 2 Comp. Laws, § 4424, as claims against the county, the board of supervisors of such county cannot refuse to pay the same on the ground that such persons were residents of another county.

Certiorari to Cheboygan; Shepherd, J. Submitted April 3, 1903. (Calendar No. 19,848.) Decided June 23, 1903.

Mandamus by Charles H. Zimmerman to compel the board of supervisors of Cheboygan county to audit and pay a claim. From an order denying the writ, relator brings *certiorari*. Reversed.

Reilley & Chambers, for relator.

Homer H. Quay, for respondent.

PER CURIAM. Two persons in the village of Mackinaw City were taken ill with smallpox. The health board of the village took care of them, employed nurses, furnished provisions, etc., and employed one Dr. George E. Brown to take medical care of them. The parties furnishing

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such materials and rendering the services assigned their claims to the relator. Their bills amounted to $266.67, and were made out to the county. They were allowed by the board of health of the village as claims against the county. It is admitted that the bills were reasonable. The account was presented to the board of supervisors, and rejected by them for two reasons: (1) That neither of the parties afflicted with the disease, and in whose behalf the bills were contracted, belonged to the county of Cheboygan; (2) that Dr. Brown had a contract with the board of supervisors, covering all the items of the bill, and that the services rendered by him were rendered under section 4460, 2 Comp. Laws, and that for these services the village or township, and not the county, is responsible, under section 4462, 2 Comp. Laws.

The respondent determined that one of the afflicted persons was a resident of Kent county, and the other of Emmet county. The board of supervisors made a contract with Dr. Brown, in which he agreed, for a sum named, to furnish all necessary medical treatment, drugs, and medicines, for the period of one year, for the proper care and treatment of any and all indigent persons unable to pay for medical care and treatment, and who had no person or persons legally bound to support them within the county of Cheboygan, and who might be afflicted or infected with any contagious, infectious, or communicable disease dangerous to the public health; such persons, at the time when so requiring medical aid, being residents of or being in "the following named townships or territory, which shall be known as District No. 2, viz.: The township of Mackinaw, and Hebron township, except south tier of sections." This contract was carried out, and Dr. Brown received his pay in accordance therewith.

Upon the refusal of the board of supervisors to allow the bill, the relator petitioned the circuit court for the county of Cheboygan for the writ of *mandamus* to compel its allowance and payment. The court below refused the writ. It is now before us by writ of *certiorari*.

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1. Dr. Brown's bill is covered completely by his contract with the respondent. His agreement was to perform all services for which the county would be liable. Such contract is valid.

2. The claim was allowed by the local board of health, and presented to respondent, under section 4424, 2 Comp. Laws, which reads as follows:

"When any person coming from abroad, or residing in any township within this State, shall be infected, or shall lately before have been infected, with the smallpox, or other sickness dangerous to the public health, the board of health of the township where such person may be shall make effectual provision in the manner in which they shall judge best for the safety of the inhabitants by removing such sick or infected person to a separate house, if it can be done without danger to his health, and by providing nurses and other assistance and necessaries, which shall be at the charge of the person himself, his parents, or other persons who may be liable for his support, if able; otherwise, as a charge of the county to which he belongs. * * *"

A majority of the court are of the opinion that, under the previous decisions of this court (*McKillop* v. *Board of Sup'rs of Cheboygan Co.*, 116 Mich. 614 [74 N. W. 1050]; *Village of St. Johns* v. *Board of Sup'rs of Clinton Co.*, 111 Mich. 609 [70 N. W. 131]; *Elliott* v. *Board of Sup'rs of Kalkaska Co.*, 58 Mich. 452 [25 N. W. 461, 55 Am. Rep. 706]; and *Browne* v. *Board of Sup'rs of Livingston Co.*, 126 Mich. 278 [85 N. W. 745]), this claim was properly presented to the respondent board of supervisors, and that, under those decisions, it is the purpose of the law to make these claims an original claim against the county. It was therefore the duty of the respondent to pay these bills, it being conceded that they are reasonable and contracted in good faith. If the respondent thinks another county is liable, it may pursue the claim against such county.

It follows that the judgment must be reversed as to this part of the claim. No costs will be allowed.

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MOSAIC TILE CO. *v.* CHIERA.

1. TRIAL—REQUESTS TO CHARGE—PROPOSITIONS OF LAW.
   It is not error for the trial court to refuse requests to charge consisting of abstract propositions of law, the application of which to the case in hand would not be readily apparent to the jury.

2. CONTRACTS—BREACH—RECOUPMENT—INSTRUCTIONS.
   Defendant, in an action for the balance of the contract price for certain work on a building, was not harmed by an instruction to the effect that there could be no recoupment unless the recovery should be on the *quantum meruit* alone, where the court further charged that plaintiff could not recover on the contract unless he had fully performed it and defendant had accepted the work, and also fairly submitted to the jury defendant's claim for damages for breach of an express warranty.

3. SAME—QUANTUM MERUIT.
   One who has failed fully to perform his contract for certain work on a building may nevertheless recover under the *quantum meruit*, where the owner has appropriated so much as was done, subject to the latter's right of recoupment.

4. SAME—HARMLESS ERROR.
   Where the verdict shows that it was not rendered on the *quantum meruit*, it is immaterial that there was no proof of the value of the work.

Error to Wayne; Frazer, J. Submitted April 10, 1903. (Docket No. 28.) Decided June 23, 1903.

Assumpsit by the Mosaic Tile Company against Gabriel Chiera to recover a balance due under a contract for certain work on a building. From a judgment for plaintiff, defendant brings error. Affirmed.

James H. Pound, for appellant.

Bowen, Douglas, Whiting & Murfin, for appellee.

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HOOKER, C. J. The defendant contracted in writing for the tilework in an elaborate Turkish bath. By this contract the plaintiff promised to furnish and put in place, including the concrete foundation, "all the tilework for floors, walls, ceilings, and plunge pools required for a Turkish bath house," etc. It was further agreed that plaintiff would "do the work and furnish the materials to the full and entire satisfaction of the superintendent of said building, J. W. Cotteral, Jr., and to the satisfaction of" the defendant. Plaintiff further agreed:

"That it will warrant and guarantee the work put in the said building by them, and embraced in this contract, for the period of five years from the date of completion; and that they will, within ten days after receiving notice, replace and make good any damage to tilework caused by imperfect workmanship or materials, or which may be caused by the settling of floors or foundations due to any cause whatever; it being understood that this guaranty does not cover damage caused by accident, nor willful or malicious destruction by employés or the public. The said party of the second part further agrees to furnish bond for two thousand dollars ($2,000), signed by two responsible sureties, for the faithful performance of this contract."

The bond was given. Payment to the extent of 85 per cent. was to be, and was, made as the work progressed, and 15 per cent. was to be paid within 60 days after completion and acceptance. This 15 per cent. has not been paid, and this action was brought to recover it.

The declaration contained a special count upon the writing, and the common counts. With a plea of the general issue, the defendant filed a notice of recoupment, which alleged that the tiling had faded and lost its original color, and had never been replaced by the plaintiff, although requested, etc., and that the tiling and floor had settled out of shape, and had bulged so as to be uneven, and that it did not drain, and in consequence the water would stand in pools upon it, and that the material and labor were of inferior quality.

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The controversies of fact appear to have been, in the main, *first*, whether the plaintiff furnished the materials and did the work as required by the contract; *second*, whether the same was to the satisfaction of the defendant, and was accepted by him; *third*, whether the tile faded or lost their original color from any fault in the tile; *fourth*, whether the water stood upon the floor, and would not drain, through plaintiff's fault,—all of which questions were submitted to the jury. A verdict and judgment for the plaintiff resulted, and the defendant has taken a writ of error. Upwards of 120 errors are assigned. We cannot consistently discuss each separately, and by far the greater number would furnish little excuse for so doing.

In his instructions to the jury, the learned circuit judge said that the plaintiff had undertaken that its work should be satisfactory to the defendant, and that, before it could be entitled to a verdict, it must show not only that it had done the work according to its contract, but that it had been accepted by the defendant. In that case it would be entitled to recover upon the contract the remaining 15 per cent. of the contract price; otherwise it could not recover upon the contract. He said, further, that if the work had not been accepted, or if the contract had not been fully performed, the plaintiff might recover, under the common counts, the value of the material furnished and labor performed, less such damages as the defendant had sustained through the failure of the plaintiff to carry out the contract. He instructed the jury that the contract bound the plaintiff to furnish good, substantial tiling, but not better than such tiling usually is; that much testimony had been introduced in regard to the cleaning of the tile, and the methods used by the defendant in that respect; and that this testimony had a bearing upon the questions whether this was good or poor tiling, and whether it had received proper treatment by the defendant. He said to the jury that if the water failed to drain off, and this was due to the furnishing of improper levels or slope by the defendant's superintendent, the plaintiff was not liable for the

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defect, and that, if the bulge and cracks in the bottom of the pool were due to a defective foundation furnished by the plaintiff, it was liable, while, if occasioned by work done by another contractor, it was not.

This was a clear and succinct charge of the main features in the case, and was easily comprehensible by the average juror. Defendant's counsel has excepted to, and assigned error upon, each of his 28 requests to charge. Many of these requests are abstract propositions of law, without anything to indicate to the jury their application to the case; *e. g.*:

"Parties who are of full age and competent may make contracts, which it is the duty of courts to enforce as made."

"The purpose of construction of a contract is to give effect to an instrument, not to defeat it."

"An equity against the words of an express contract, where there is no want of capacity or legality, fraud or mistake, shown in the making of the contract, cannot be recognized."

"The intention of the parties, as expressed in their contracts, is to govern in the construction of them."

"All the words in a contract are to be taken as inserted for some purpose."

"An agreement was made with an artist, for a portrait, that it need not be taken or paid for if unsatisfactory. *Held*, that, however good the picture was, the customer is the only judge whether it suits him or not, and, if not, he cannot be compelled to pay for it."

"In the absence of any ambiguity in a written instrument, it must be interpreted according to its plain terms, no fraud or mistake being claimed."

Most of the others relate to questions of fact, which the court properly left to the jury; and, in our opinion, there is nothing in these requests, which the defendant was entitled to have the jurors' attention called to, that was not covered by the charge.

Counsel's eighty-seventh assignment is as follows:

"In charging the jury, if there had been an acceptance of the work, then there could be no recoupment, in effect,

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which could only be applied if the recovery was based upon the *quantum meruit* alone."

The court charged the jury that the plaintiff could not recover unless (1) it had faithfully performed the contract; (2) the defendant had accepted the work. He afterwards said that, if it sought to recover on the *quantum meruit*, there might be a recoupment. As it is patent that there could be no recoupment if the contract was fully performed and accepted, and the plaintiff could not recover on the contract unless there was such performance and acceptance, the defendant was not injured by the instruction, unless, by reason of a subsequent breach of the warranty, he was entitled to damages. Plaintiff had given a bond to cover such damages, and its counsel contended that an action on the bond was the only remedy, and that recoupment was not permissible in such case; but the court held otherwise, and included such damages, apparently taking the view that a breach of the warranty was a breach of the contract, and said to the jury:

"I am asked to charge you, and it has been stated in this case several times, that, under the terms of this contract, a bond has been given, and that bond, in substance, guarantees—which the contract itself does—guarantees the character of this work for the term of five years, and that, if there is anything that has occurred after the acceptance that shows the work didn't hold out under this guaranty, that suit should be brought upon this bond; and a great deal of evidence has been objected to as not properly bearing on this issue as framed under the pleadings of this case, but that I should not have permitted this question of recoupment to be interposed here at all, but that they should be relegated to their remedy on the bond. I do not think that is the law. I think that whatever damages, if there are any damages, that, under the evidence, this defendant can recoup here. Why, gentlemen, it would apply,—it would be deducted and determined in any suit that subsequently might be brought upon the bond; and I think that the defendant in this case is at liberty to plead that recoupment here, and waive his remedy upon the bond, if he sees fit; and, if he does recoup any damages here, he waives any remedy that

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he may have upon the bond up to the time at which that plea in recoupment was interposed, and that, if it can be recovered upon the bond, if any breach of the bond occurred, it would have been subsequent to the time when any issue was made in this case under that plea of recoupment. So, under this issue, if you shall find that there has been a breach of this contract on the part of the plaintiff, and the defendant has suffered damage from it, you may award that damage to the defendant, as against the claim of the plaintiff, even if it overcomes the amount of the plaintiff's claim, and render judgment for the balance to the defendant, if you shall find anything of that kind."

The warranty is hereinbefore set forth. Under it, the plaintiff undertook to replace defective tile, and remedy defects in workmanship, on notice; and the jury must have found that it has not refused or neglected, after notice, to perform its obligation under the guaranty. The defendant suffered no injury by the charge as given.

It is urged that there is no proof of the value of this work, and that, there being an express contract, there can be no recovery upon the *quantum meruit*. The cases cited by counsel show plaintiff's right to recover, although the contract should be found not to have been performed, in view of defendant's appropriation of the work, but subject to the usual rule relating to recoupment. *Allen* v. *McKibbin*, 5 Mich. 449; *Wildey* v. *School District*, 25 Mich. 419; *Sheldon* v. *Leahy*, 111 Mich. 29 (69 N. W. 76); *Martus* v. *Houck*, 39 Mich. 434 (33 Am. Rep. 409); *Hanley* v. *Walker*, 79 Mich. 607 (45 N. W. 57, 8 L. R. A. 207); *Guthat* v. *Gow*, 95 Mich. 527 (55 N. W. 442); *Boots* v. *Steinberg*, 100 Mich. 139 (58 N. W. 657); *Crawford* v. *Schneider*, 106 Mich. 199 (64 N. W. 39); *Eaton* v. *Gladwell*, 108 Mich. 678, 121 Mich. 451 (66 N. W. 598, 80 N. W. 292); *Moran* v. *Schmitt*, 109 Mich. 282 (67 N. W. 323).

It is said that there was no evidence of the value of this work, and therefore that there could be no recovery on the *quantum meruit*. We do not find that this was called to the court's attention; but, if there would otherwise be anything in the point, it is rendered unimportant

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by the verdict, which shows that it was not rendered upon the *quantum meruit*.

This disposes of all questions except those upon the introduction of evidence and the alleged misconduct of court and counsel. We have endeavored to examine them all, and find nothing that warrants a reversal of the cause; nor do we discover any a discussion of which would benefit the profession.

The judgment is affirmed.

The other Justices concurred.

POLLARD v. CITY OF CADILLAC.

MUNICIPAL CORPORATIONS — ACTIONS AGAINST — PRESENTATION OF CLAIM TO COUNCIL.

A provision of a city charter making it a sufficient defense to an action for the collection of any demand or claim against the city, that it has never been presented to the council for allowance, does not apply to actions *ex delicto*,—*e. g.*, an action for flooding premises through the clogging of a sewer.

Error to Wexford; Chittenden, J. Submitted April 10, 1903. (Docket No. 34). Decided June 23, 1903.

Case by James C. Pollard against the city of Cadillac for flooding plaintiff's premises. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

U. S. Albertson, for appellant.

Fred S. Lamb, for appellee.

HOOKER, C. J. The defendant, a city, was sued for damages occasioned by flooding plaintiff's premises with filth from the clogging of its sewer. The court directed a

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verdict for the defendant upon the ground that the claim had not been presented to the council before the action was begun, under the following provisions of the charter of the city, viz.:

"The council shall audit and allow all accounts chargeable against the city; but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with an affidavit of the person rendering it to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city, that the sums charged therefor are reasonable and just, and that, to the best of his knowledge and belief, no set-off exists nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim. And every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each. It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city, that it has never been presented, verified as aforesaid, to the council for allowance; or that the claim was presented without the affidavit aforesaid, and rejected for that reason; or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it." [1]

The case is ruled by *Lay* v. *City of Adrian*, 75 Mich. 438 (42 N. W. 959), and *Mackie* v. *City of West Bay City*, 106 Mich. 242 (64 N. W. 25). It is urged that injuries to land are expressly excepted from the rule by the opinion in the former case, which says:

"None of them were claims made for personal injury. They were actions in *assumpsit*. The first was brought to recover for a quantity of sand it was alleged the city of Detroit had received and not paid for; and the last two, to recover for alleged illegal taxes paid under protest.

"I do not think the statute was ever intended to apply to claims of the character of that in the present suit, but to those arising out of contract, express or implied, or for injury to property, real or personal, where the amount claimed may be computed, after the facts are established, by some fixed rules or mode of computation."

[1] 1 How. Stat. § 2528; Act No. 429, tit. 10, § 2, Local Acts 1895.

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This language was used, but doubtless it was from an indisposition to pass upon a case not then before the court. Such cases are clearly within the principle of the cases cited. The case of *Snyder* v. *City of Albion*, 113 Mich. 275 (71 N. W. 475), draws no such distinction, but apparently excepts all actions *ex delicto* from the effect of a similar statute. We think this the correct interpretation of the charter before us.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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HOSKINS v. ROCHESTER SAVINGS & LOAN ASSOCIATION.

1. BUILDING AND LOAN ASSOCIATIONS—EVIDENCE—MATTERS WITHIN KNOWLEDGE OF DECEASED AGENT.
   A borrowing member of a building and loan association cannot testify, in a suit to cancel the mortgage, to matters which were equally within the knowledge of a deceased agent of the association.

2. SAME—FOREIGN CORPORATIONS—PLACE OF CONTRACT — USURY.
   Where a loan made by a foreign building and loan association is secured by mortgage on property in Michigan, and payments are made to a local agent therein, in accordance with the original understanding of the parties, the contract is a Michigan contract, and within our usury laws. *National Mut. Bldg. & Loan Ass'n* v. *Burch*, 124 Mich. 57, approved.

3. SAME—VOID CONTRACT—ACTION.
   By the express terms of 2 Comp. Laws, § 7594, a contract made by a foreign building and loan association, which has not complied with the statutory prerequisites to its right to do business in this State, is void, and no action can be maintained thereon.

4. SAME—PAYMENTS—AGENCY.
   A payment to a local agent of a foreign building and loan association is a payment to the association, notwithstanding

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a provision of its by-laws that he shall be deemed the agent of the member. *Wagner* v. *Supreme Lodge K. of H.*, 128 Mich. 660, followed.

Appeal from Cheboygan; Shepherd, J. Submitted April 23, 1903. (Docket No. 43.) Decided June 23, 1903.

Bill by Alexander Hoskins and Alice Hoskins against the Rochester Savings & Loan Association to obtain the cancellation of certain mortgages. From a decree for complainants, defendant appeals. Affirmed.

Frost & Sprague, for complainants.

Thomas & Neary and *Ralph L. Aldrich*, for defendant.

GRANT, J. The defendant is a corporation organized under the laws of the State of New York, and having its home office at Rochester, in that State. While doing business in this State, and on January 31, 1895, complainant Alexander Hoskins made application to it for a loan of $300, to be secured by bond and mortgage on the real estate therein described. The application was passed upon and approved by the local board, the land and title thereto examined by one Dozer, defendant's local agent at Cheboygan, the papers forwarded to the home office, and subsequently, on February 18, 1895, a bond and mortgage collateral thereto were executed by the complainant and his wife, Alice. A certificate for three shares of stock of the company was also issued to Mr. Hoskins, and immediately assigned to the defendant as additional security for the loan. On November 12, 1895, complainant Alice Hoskins made a like application for a loan of $500, and papers exactly similar, except in the names and amounts, were executed. The mortgages and bonds provided for monthly payments, known as "interest," "premiums," and "principal," for 72 months, which 72 payments were supposed to pay the mortgage and mature the stock. Complainants made these 72 payments, and asked releases of their mortgages. The defendant refused, claiming between two and

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three hundred dollars to be still due upon the mortgages, and that the stock had not matured. Complainants then filed their bill in equity to declare the mortgages paid and to have them canceled. Defendant answered, denying full payment, and asking foreclosure for the balance due. Proofs were taken in open court. Decree was entered for complainants. The court found that the mortgages had been paid; that the contracts were usurious; that they were Michigan, and not New York, contracts; and that Mr. Dozer, its agent, and others to whom payments were made after his death, were the agents of the defendant.

Complainants claim that representations were made to them by defendant's agent Dozer similar to those made in *Sawyer* v. *Building Ass'n*, 103 Mich. 228 (61 N. W. 521). The agent Dozer had died before the hearing. The court held that Mr. Hoskins could not testify to matters equally within the knowledge of the deceased agent. In this we concur.

The court held that the contracts were usurious, and that they had been fully paid. If they were regarded as loans, it seems to be conceded the complainants have fully paid both principal and interest. This case is ruled by *National Mut. Bldg. & Loan Ass'n* v. *Burch*, 124 Mich. 57 (82 N. W. 837, 83 Am. St. Rep. 311). The learned circuit judge, in his opinion, said: "The statement of facts in that case and this are so nearly alike that they might almost be used interchangeably." In this we concur. It is therefore unnecessary to make a full statement of the facts, as all the questions but one are fully covered by that decision. The learned counsel for defendant have furnished an able brief on the questions involved, and have made a thorough examination of the authorities. We, however, held in *National Mut. Bldg. & Loan Ass'n* v. *Burch*, *supra*, that such contracts are Michigan, and not foreign, contracts, and the brief has failed to convince us that we should overrule that case.

The legislature of 1895 passed an act which was approved June 4, 1895, and took effect the following Sep-

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tember. Act No. 269, Pub. Acts 1895. The defendant did not comply with the provisions of that act, and thereupon substantially ceased to do business in this State. The contract of complainant Alice Hoskins was made after that act took effect. It was therefore void. 2 Comp. Laws, § 7594. And no action can be maintained upon such a contract. 3 Comp. Laws, § 10467; *Seamans* v. *Temple Co.*, 105 Mich. 400 (63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457).

That payments to Mr. Dozer and defendant's other agents at Cheboygan were payments to the defendant, is established by *Wagner* v. *Supreme Lodge K. of H.*, 128 Mich. 660 (87 N. W. 903).

Decree is affirmed, with costs.

The other Justices concurred.

TOWNSHIP OF FLYNN *v.* WOOLMAN.

1. DRAINS — ESTABLISHMENT — ORDER OF DETERMINATION — TIME LIMIT.

   Under 2 Comp. Laws, § 4320, providing that, on the filing of an application for a drain, the commissioner shall examine the route of the proposed drain, and if, on survey, he shall find the drain to be practicable, he shall within 90 days make his first order of determination, the 90 days date from the survey, and not from the filing of the application.

2. SAME — RECORD OF COMMISSIONER — JURISDICTION.

   The fact that the record of the commissioner does not show when the minutes of the survey were delivered to him is not fatal to the jurisdiction, though more than 90 days elapsed between the filing of the application and the first order of determination, in view of the provision of 2 Comp. Laws, § 4364, that no drain tax shall be declared void by reason of any error or informality in the record of the proceedings.

3. SAME — VACATION OF EXISTING DRAIN.

   Where neither a township nor any of its taxpayers was assessed

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for the construction of a drain, it cannot complain of a failure to vacate such drain before constructing a second one over its route.

4. SAME—NOTICE.

2 Comp. Laws, § 4383, requiring notice to be given in case a drain is vacated, has no application where a proposed drain merely taps an existing drain, leaving it to perform its office.

5. SAME—CONDEMNATION PROCEEDINGS—PARTIES.

Under 2 Comp. Laws, § 4323, providing that notice of an application to the probate court for the appointment of commissioners in a drain proceeding shall be given to all persons whose lands are traversed by the drain who have not released the right of way, a township which is liable to assessment for the drain cannot complain because notice was not served on its supervisor.

Appeal from Sanilac; Beach, J. Submitted April 23, 1903. (Docket No. 48.) Decided June 23, 1903.

Bill by the township of Flynn against Hugh Woolman, county drain commissioner, and others, to enjoin the construction of a drain. From a decree dismissing the bill, complainant appeals. Affirmed.

C. F. Gates, for complainant.

Fred A. Farr, Prosecuting Attorney, and *W. H. Burgess*, for defendants.

CARPENTER, J. Defendant Woolman is drain commissioner for the county of Sanilac. He is proceeding to construct a drain called the "Carter Drain," in the township of Elmer, in said county. The other defendants are contractors for the construction of said drain. Five per cent. of the total cost of said drain, amounting to $390, is to be assessed upon complainant township, and 11.45 per cent., amounting to $893.10, is to be assessed against individual landowners, taxpayers in said complainant township. Complainant instituted this suit to enjoin the construction of said drain. The hearing in the lower court resulted in a decree dismissing complainant's bill. From

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this decree, complainant has appealed. It claims that it is entitled to relief upon these grounds:

(1) The drain commissioner had no right to proceed, because the first order of determination was not made within 90 days after the application was delivered to him.

(2) The drain commissioner had no right to proceed, because the record fails to show that any steps or proceedings were taken by the commissioner for more than 90 days before making his first order of determination.

(3) It is proposed to construct said Carter drain for over 1½ miles on the route of another established drain, called the "Hale Extension Drain," without vacating the latter drain as required by law.

(4) In the construction of a branch of said Carter drain, it is sought to vacate 1½ miles of a drain known as the "Flynn & Elmer Drain," without giving complainant a hearing as required by law.

(5) No notice was served upon complainant's supervisor of the proceedings to lay out the drain.

1. Must the first order of determination be made within 90 days after the application is delivered to the commissioner? The application was dated November 19, 1900, and was delivered to the drain commissioner November 20, 1900. The first order of determination was made March 4, 1901. Section 4320, 2 Comp. Laws, reads:

"Upon the filing of such application, the county drain commissioner authorized to act thereon shall, as soon as practicable thereafter, proceed to personally examine the route of the proposed drain, and if, in his opinion, it is necessary and conducive to the public health, convenience, or welfare that the application should be granted, he shall, as a means of determining the practicability thereof, make a survey and measurement of the line of the proposed drain, or cause the same to be made by a competent surveyor. If upon such survey he shall find such drain to be practicable, he shall within ninety days make his first order of determination in writing in accordance therewith."

We think it clear that this language does not require the first order of determination to be made within 90 days after the application is filed. It gives the commissioner 90 days after the survey to make said order.

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2. It is claimed that the commissioner, under the foregoing construction, had no right to proceed, because the record failed to show any step or proceeding taken by him between the receipt of the application, November 20, 1900, and the making of the first order of determination, March 4, 1901. This raises the question of whether the proceedings of the commissioner were defective because the record did not show when the minutes of the survey were delivered to the commissioner. No claim is made that, as a matter of fact, the first order of determination was not made within three months after the minutes of the survey were delivered. Indeed, defendants introduced testimony, against the objection of complainant, proving that said minutes were delivered about the last of January, 1901. In determining whether or not the record must affirmatively show when the minutes of the survey reached the commissioner, it should be borne in mind that there is no express provision of the statute requiring it. If the statute imposes upon the drain commissioner any obligation to make such record, it must be found by implication in the sentence, "If upon such survey he shall find such drain to be practicable, he shall within ninety days make his first order of determination in writing." Assuming that the legislature intended by this language to impose that obligation upon the drain commissioner, they did not intend that his failure to observe it should invalidate the tax, since they provided (see section 4364, 2 Comp. Laws):

"The collection of no tax levied or ordered to be levied for the payment of the location or construction of any drain laid out under this act shall be perpetually enjoined or declared absolutely void in consequence of any error or informality of any officer in the location and establishment thereof, nor by reason of any error or informality appearing in the record of the proceedings by which any drain shall have been located and established."

From this we infer that the legislature did not intend to make the jurisdiction of the commissioner depend on his recording the date of the receipt of the minutes of the sur-

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vey. The decision of this court in *Moser* v. *White*, 29 Mich., at page 60, relied upon by complainant, that "every essential proceeding in the course of a levy of taxes must appear in some written and permanent form in the records of the bodies authorized to act upon them," has, in our judgment, no application. The date of the receipt of the minutes of the survey was not, within the meaning of the decision in that case, an "essential proceeding."

3. Did the failure to take steps to vacate the Hale extension drain, so called, before constructing over its route the proposed drain, invalidate the proceedings? Said Hale extension drain nowhere touches the territory of complainant. Neither complainant nor any of its taxpayers were assessed for its construction. For this reason, complainant has no right to complain that proceedings were not taken to vacate it.

4. Is complainant entitled to relief on the ground that it is sought to vacate 1½ miles of the Flynn & Elmer drain, so called, without any notice to complainant? It is a sufficient answer to this contention of complainant to say that the proposed action of defendants does not, in our judgment, vacate said Flynn & Elmer drain. A portion of the proposed drain taps said Flynn & Elmer drain, and thereby affords a much-needed outlet to the waters therein. This does not, strictly speaking, vacate said Flynn & Elmer drain. The said drain is left to perform the office for which it was built, though the evidence in this case proves that, owing to a cut below the intersection with the proposed drain, it either partially or entirely fails to perform that purpose. It follows that the provision in section 4383, 2 Comp. Laws, prescribing the notice to be given in case a drain is vacated, relied upon by complainant, has no application.

5. Is complainant entitled to relief because no notice was served upon its supervisor of the proceedings to lay out the drain? As we understand the record, the complaint is that no notice was served upon the complainant's supervisor of the proceedings in the probate court

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before the commissioners were appointed. We do not think this objection well grounded. The only persons entitled to notice at that stage (see 2 Comp. Laws, § 4323) are those "whose lands are traversed by such drain, who have not released the right of way."

In our judgment, the decree of the court below should be affirmed, with costs.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

MICHIGAN TRUST CO. v. HERTZIG.

WILLS—CONSTRUCTION—LIFE ESTATE—RIGHT OF POSSESSION.

Where testator appointed a trust company his "executor," and gave to his wife "all the use and income" of his entire estate during her life or widowhood, with remainder over to designated beneficiaries, the widow was entitled to the possession and control of all the property, personal as well as real, as soon as the estate should be administered.

Appeal from Kent; Perkins, J. Submitted April 24, 1903. (Docket No. 31.) Decided June 23, 1903.

Bill by the Michigan Trust Company against Theresa Hertzig and others for the construction of a will. From a decree for defendants, complainant appeals. Affirmed.

Peter Hertzig, the husband of Theresa Hertzig, died testate April 19, 1901. His estate consisted of real estate, two farms and a house and lot, valued at $12,500. His personal estate consisted of notes, mortgages, and money in bank, of the value of $9,000. He left surviving him his widow and a son, F. Peter Hertzig, aged 5 years. He also had a stepson 15 years of age, Joseph Kirchner. His will, omitting the formal parts, is as follows:

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"*First.* I do hereby constitute and appoint the Michigan Trust Company of Grand Rapids, Michigan, to be the executor of this, my last will and testament, directing them to pay my just debts and funeral expenses out of my estate.

"*Second.* I give and devise to the priest of St. Mary's Church of the city of Grand Rapids, Michigan, the sum of one hundred dollars, to be used for reading masses for the benefit of myself, my deceased parents, and my deceased wife, Emilie Hertzig.

"*Third.* I give to my wife, Theresa Hertzig, in lieu of the dower and all her other rights in my property, all the use and income of my entire estate, both real, personal, and mixed, of which I die seised and possessed or to which I may be entitled at the time of my death, for and during the term of her natural life, and as long as she remains unmarried and my widow.

"*Fourth.* In case my wife should marry after my decease, she shall only be allowed so much of my estate as the laws of the State of Michigan allow her if I had died intestate.

"*Fifth.* After my wife's death, or in case of her marriage, my estate shall be disposed of as follows: To my stepson, Joseph Kirchner, I give the sum of one thousand dollars, to be paid to him when he becomes of age. All the rest, residue, and remainder of my estate, real, personal, and mixed, I give, devise, and bequeath to my child or children then living, to have and to hold the same or their heirs forever."

Defendant Theresa had possession of some of the personal property belonging to the estate, and insisted that, by the terms of the will, she was entitled to the possession of both the real and personal property during her widowhood, and life, if she did not remarry. The complainant insists that it is a trustee, rather than the mere executor of the will, and that it is entitled to the management, control, and possession of both the real and personal estate, obligated only to pay to Theresa the income of the property during her life or widowhood. Complainant filed this bill to obtain a construction of the will, and to restrain the defendants from interfering with its control and possession of the property. The case was heard upon pleadings and proofs, and the court rendered a

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decree that the complainant was a mere executor, and not trustee; that it was entitled to the possession of the personal property for the purposes of administration; that the defendant Theresa was entitled to the possession of the real estate; and that she is entitled to the possession of the personal property as soon as the estate shall be fully administered, and all its debts and legacies paid, except the legacy payable to Joseph Kirchner.

Stace & Albers (*Grove & McDonald*, of counsel), for complainant.

McKnight & McAllister, for defendant Theresa Hertzig.

J. Byron Judkins, for defendant minor heirs.

GRANT, J. (*after stating the facts*). We think the court reached the correct conclusion. It is conceded that the cardinal rule in interpreting wills is to ascertain the intention of the testator, and that this intention must be found, if possible, within the four corners of the instrument. This court has in many cases applied this rule. No two wills in all the cases are exactly alike. The result in every instance has depended upon the application of the rule to the language of the instrument to be interpreted. A discussion of the case is not necessary; neither would it be profitable. We think, under the authorities, that the provision giving to his widow "all the use and income of my entire estate, both real, personal, and mixed, * * * for and during the term of her natural life, and as long as she remains unmarried and my widow," means that she has the entire use and income therefrom. She cannot have this if it must remain in the hands of a trustee, whose charges and expenses must first be paid. She can have it only by the possession and control of the property. We find nothing within the four corners of this instrument to indicate that the testator intended to confer upon the complainant any other duty than that of the ordinary executor, whose duty it is to

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take the usual steps for closing up the estate. The provisions of this will are very similar to those in *Patterson* v. *Stewart*, 38 Mich. 402, and *Gee* v. *Hasbrouck*, 128 Mich. 509 (87 N. W. 621). Many of the cases decided are cited in the opinion of my Brother HOOKER in *Gee* v. *Hasbrouck*, in which the cases from this court mainly relied upon to sustain the complainant's contention are referred to.

The decree is affirmed, with costs of this court to defendant Theresa Hertzig, to be paid out of the estate.

The other Justices concurred.

PEOPLE *v* RANDALL.

RAPE—EVIDENCE—SUFFICIENCY.

In a prosecution for rape, where the testimony of the prosecutrix was contradicted by that of respondent, but the latter's conduct, immediately after the arrest of his brother on a similar charge, was indicative of a fear of prosecution, and tended to corroborate the charge, the case was peculiarly one for the jury, and a conviction was not disturbed.

Error to Gratiot; Stone, J. Submitted April 24, 1903. (Docket No. 177.) Decided June 23, 1903.

Caleb Randall was convicted of statutory rape, and sentenced to imprisonment for 15 years in the State prison at Jackson. Affirmed.

W. A. Leet, for appellant.

Charles A. Blair, Attorney General, and *Julius B. Kirby*, Prosecuting Attorney, for the people.

HOOKER, C. J. The defendant was convicted of statutory rape upon a child under the age of 16 years. Error is

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alleged upon the ground that the evidence is insufficient to sustain a conviction: (1) Because she was prompted to make the complaint by the prosecuting attorney; (2) because her testimony is contradicted by the defendant, thus making the evidence balance.

It is unnecessary to discuss the testimony at length. The conduct of the defendant, immediately after the arrest of his brother upon a similar charge, is indicative of a fear of prosecution, and tends to corroborate the charge. The case was peculiarly one for a jury. Evidently they believed the child and disbelieved her uncle. Her surroundings, and the habits of life, and want of care over her, of her mother, subjected her to unusual dangers. The responsibility for this conviction rests upon the jury, where it properly belongs, and we cannot say that the verdict was not just. It evidently met the approval of the learned circuit judge who heard the cause, and who would doubtless refuse to permit a grossly improper verdict to stand.

The judgment is affirmed.

The other Justices concurred.

PEOPLE v. WILSON.[1]

1. BURGLARY—EVIDENCE—OBJECTIONS—APPEAL.
   On an appeal from a conviction for burglary, the testimony of a witness who aided in apprehending respondents, that he did not "size them up" as railroad men, was not available error, because of his not having been shown to know how railroad men look or dress, where no such objection was made in the trial court.

2. SAME.
   Where three men were arrested for the same burglary, it was competent, on the trial of one of them, to show what property was found on the persons of all three.

[1] Rehearing denied September 22, 1903.

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3. CRIMINAL LAW—EVIDENCE—HARMLESS ERROR.

The voluntary statement of a witness on a criminal trial, that he had learned that the name under which respondent was being prosecuted was not his true name, is not ground for reversal, where, on further inquiry by the court, witness testified that he did not know respondent's true name.

Error to Wayne; Donovan, J. Submitted April 24, 1903. (Docket No. 172.) Decided June 23, 1903.

Frank Wilson was convicted of burglary, and sentenced to imprisonment for 14 years in the State prison at Jackson. Affirmed.

Charles T. Wilkins, for appellant.

Ormond F. Hunt, Prosecuting Attorney, and *Ward N. Choate*, Assistant Prosecuting Attorney, for the people.

HOOKER, C. J. This defendant was charged, with two others, with the offense of burglary, in breaking and entering an office, and blowing open a safe, and stealing money therefrom. Separate trials were had, and this defendant has appealed.

The noise of the explosion was heard, and a man living in the vicinity saw three men who were apparently engaged in the burglary, and was shot at by them, or one of them. He was able to give some description of them. Two or three hours later, the defendant and two others boarded an electric car in the outskirts of Detroit, some 10 miles from the place of the burglary, and were spotted by the conductor, who had been requested to look out for three men. He informed an officer, and they were arrested, and, on being searched, were found to have $18.20 each, consisting of bills and coin. The officers also found a counterfeit coin, which was identified as one taken on the occasion of the burglary, and also a pair of spectacles, which one of these men had tried to sell the witness the day before the burglary. Wilson was shown to have misrepresented his whereabouts.

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Complaint is made that the conductor of the street car was permitted to say that he did not "size them up" as railroad men, and that the circuit judge stated that railroad men did not wear standing collars. It is now urged that the conductor was not shown to know how railroad men looked or dressed. No objection appears to have been made upon any such ground. Upon the other point, it appears that the court made no such statement. He asked the witness "if railroad men often wore standing collars," and he answered, "No."

It was competent to show what property was found upon the persons of all three of the men arrested for the same transaction.

There is no error in the testimony of Wolf, in regard to his learning that Wilson was not defendant's true name. The witness was not asked to state this, and the question asked was proper. The court then asked him whether he knew what his true name was, and he answered that he did not.

The principal question relates to the failure of the court to direct a verdict for the defendant; it being urged that the testimony was insufficient to identify this defendant, and connect him with the transaction. In our opinion, the circumstances justified the submission of the case to the jury, and we find nothing in the charge which was likely to mislead the jury.

We think it unnecessary to discuss other assignments, and that the judgment should be affirmed.

The other Justices concurred.

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PEOPLE *v.* TOUTANT.

1. ASSAULT WITH INTENT TO RAVISH—EVIDENCE—SUFFICIENCY.
   In a prosecution for assault with intent to commit the crime of rape, evidence considered, and *held* to support a finding that the assault was with the intent charged.

2. SAME—APPEAL—WEIGHT OF EVIDENCE.
   On an appeal from a conviction for assault with intent to ravish, in which the record contains only the testimony of the prosecutrix, an objection that the verdict is against the weight of the evidence cannot be considered.

Exceptions before judgment from Houghton; Streeter, J. Submitted April 24, 1903. (Docket No. 176.) Decided June 23, 1903.

Victor Toutant was convicted of assault with intent to commit the crime of rape. Affirmed.

W. A. Burritt, for appellant.

Oscar J. Larson, Prosecuting Attorney, for the people.

CARPENTER, J. Defendant, aged 17 years, was convicted in the lower court of assault with intent to commit the crime of rape. He asks that this conviction be set aside on the ground that the evidence did not warrant the jury in finding that he intended to commit said crime. To determine this question, we must examine the testimony of the prosecutrix.

She testifies that on the 18th of May, 1902, she was living on Quincy Hill, near the village of Hancock. While walking in the alley which leads to where she was living, about 11 p. m., defendant stopped her and asked her where she was going. She replied she was going home. He said he was going, too. She said, "No." "He ask me how much I want,—a dollar?" She, be-

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lieving this to be an insulting proposal, declined, in very emphatic language. He caught hold of her arm, threw her down, and put both hands on her mouth, so that she could not cry out. She got up on her knees immediately. He stood behind her, holding her head to the ground. Then, while in this position, leaving one hand on her mouth, with the other he tried to pull up her skirts. This he could not do, because she held them between her legs. When defendant removed one hand from her mouth, she succeeded in making an outcry. He then put sand in her mouth, and struck her on the head with such force as to make her sick for a week. Her cries brought help, and defendant ran away. We agree with the trial judge that this evidence warranted the jury in finding that defendant assaulted the prosecutrix with intent to commit the crime of rape.

The suggestion is made by defendant's counsel that the verdict should be set aside because it is against the weight of the evidence. As the record contains only the testimony of the prosecutrix, we are unable to review that question.

The conviction must be affirmed.

The other Justices concurred.

BALL v. AUDITOR GENERAL.

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TAXATION—VOID SALE—REFUNDING—CONSTRUCTION OF STATUTE.

Under section 111 of the tax law of 1891 (Act No. 200, Pub. Acts 1891), repealing the law of 1889 (Act No. 195, Pub. Acts 1889), but saving all existing rights, and providing that lands then delinquent should be sold under the earlier act, subject to the proviso that lands bid to the State under such provision should thereafter be subject to the provisions of the act of 1891,—where lands bid to the State under the act of 1889 were afterwards sold as State tax lands at county treasurer's

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sale held pursuant to the act of 1891, the sale was under the latter act, and, as that act contained no provision for repayment of the purchase price in case the title should be declared void, the purchaser was remediless in such contingency.

Mandamus by James E. Ball to compel Perry F. Powers, auditor general, to refund the purchase price of certain State tax lands. Submitted May 12, 1903. (Calendar No. 19,915.) Writ denied June 23, 1903.

Relator became the purchaser at the annual tax sale on May 1, 1893, of the lands described in his petition. These lands were held by the State upon sales for taxes of 1888 and 1889. Relator received his deeds, but never recorded them. He first applied to the auditor general to cancel them and refund the money paid therefor, on the ground of the invalidity of the sales under certain decisions of this court. The respondent refused. Thereupon relator applied to the circuit court, in chancery, for the county of Marquette, for the cancellation of said deeds, and for a direction to the auditor general to refund the money paid therefor. The court, in chancery, granted the prayer, setting the deeds aside as irregular and void, but refused his prayer to direct the auditor general to refund the money. He now applies to this court for the writ of *mandamus* to compel the respondent to refund him said money.

James E. Ball, in pro. per.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), for respondent.

GRANT, J. (*after stating the facts*). Relator did not purchase these lands at the sales for the delinquent taxes for the years 1888 and 1889. He purchased them under Act No. 200, Pub. Acts 1891. Acts prior to 1891 had provided for repayment to the tax purchaser where the tax deed had been held void; but Act No. 200 of 1891 contained no such provision, and the auditor general has no power to make such repayments except when author-

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ized by statute. In the absence of such provision for repayment, the purchaser buys at his risk, and takes only such title as the State had. *Crane* v. *Reeder*, 25 Mich. 320; *People, ex rel. Rice*, v. *Auditor General*, 30 Mich. 12.

Relator claims that the repealing clause of Act No. 200 (section 111) entitles him to the relief sought. The proviso of the repealing clause reads as follows:

"*Provided*, that all lands heretofore returned delinquent that have not been offered for sale shall be offered for sale by the auditor general under Act [number] 195 of the laws of 1889, and all proceedings relative to the sale of such lands, and the redemption thereof, and the issuing of deeds therefor, shall be conducted according to the provisions of said Act 195 of 1889 by the auditor general: *And provided further*, that any lands offered under the above proviso, and not sold, or that shall be bid off for the State, shall, after such offer or sale to the State, be subject to the other provisions of this act."

It appears by the second proviso that the sale in this case was made, not under the law of 1889, but under the law of 1891. The language is susceptible of but one construction. The sales under the prior law had taken effect, and the title was in the State. The law of 1891 authorized another sale, and expressly provided that that sale should be made under the provisions of that act, and not under former acts. The relator is remediless, except through an act of the legislature.

The writ is denied.

The other Justices concurred.

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VICBORN *v.* POLLOCK.

1. JUDGMENTS — COLLATERAL ATTACK — NAME OF DEFENDANT — INITIALS.

   A judgment cannot be attacked collaterally on the ground that defendant was described by his initials only, instead of his full Christian name; the record containing nothing to show that he was known by any other name than that given.

2. REPLEVIN—EXECUTION—EVIDENCE—HARMLESS ERROR.

   In replevin for property seized on execution against plaintiff's husband, defendant was not prejudiced by the exclusion of the writ under which he claimed, where the court charged the jury that plaintiff could recover only such property as she had shown belonged to her.

3. SAME—JUDGMENT.

   Where, in replevin for property seized on execution against plaintiff's husband, property belonging to the husband, and not covered by the replevin, was included in that turned over to plaintiff, defendant was entitled to a judgment for the return thereof, or its value.

Error to Cass; Carr, J. Submitted May 14, 1903. (Docket No. 79.) Decided June 23, 1903.

Replevin by Florence E. Vicborn against Arthur L. Pollock. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Modified.

Coy W. Hendryx and *James H. Kinnane*, for appellant.

C. M. Lyle and *Harsen D. Smith*, for appellee.

GRANT, J. One Burgette L. Dewey recovered a judgment against one H. P. Vicborn in justice's court for $26.65. Vicborn was a married man. He was about to leave Dowagiac, where he lived, to move to another part of the State. His goods were packed in a car ready for shipment by rail. The constable to whom the writ of

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execution was issued levied upon all these goods. While the inventory was being taken, plaintiff, the wife of H. P. Vicborn, caused a writ of replevin to be issued out of a justice's court, describing certain of these goods, which she alleged were her property. The officer seized the goods by virtue of this writ. He found the goods in the basement of a store. The entire lot was taken, placed by a drayman on board the cars, and shipped. Property was taken not covered by the writ of replevin. The court directed a verdict for the plaintiff for such of the property as was shown to be hers, but refused to direct a verdict for the defendant for the property taken upon the writ which belonged to her husband. He also directed a verdict for plaintiff for nominal damages of six cents.

In the suit of *Dewey* v. *Vicborn*, the defendant was named H. P. Vicborn. There was no appearance by him. It nowhere appeared upon the record that he was known by any other name. The court excluded the record of that suit, and the execution and levy thereunder, as void, because the Christian name of defendant was not given. In this the court was in error. The judgment was valid under *Hinkle* v. *Collins*, 113 Mich. 105 (71 N. W. 481), and *Stever* v. *Brown*, 119 Mich. 196 (77 N. W. 704), and authorities there cited, and cannot be collaterally attacked. But this erroneous ruling was without prejudice, because the judge expressly charged the jury that plaintiff could recover only such things as she had proven to be her property.

Whether plaintiff was responsible for taking goods not described in the writ does not appear. They were taken by the officer, who, by her direction, employed a drayman to convey them to the car for shipment. The officer delivered all the property to her. The court held that the right to the property belonging to her husband must be determined in another suit. We think the court in error. The officer took all the property, both that belonging to the wife and that of the husband, under the writ, evidently supposing that it was all covered by his writ. He

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delivered the same to the plaintiff. It was her duty to return to the defendant that which the jury found belonged to the husband, and that not described in the writ, as the defendant had a lawful right to levy upon it by virtue of his execution.

The judgment must be so modified as to direct a return or the value of the property which the jury found belonged to the husband. The case will be remanded, with instruction to the court below to enter such a judgment. Defendant will recover costs.

The other Justices concurred.

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MOORE *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION.

1. LIFE INSURANCE — APPLICATION — BREACH OF WARRANTY — WAIVER.

Where a life-insurance company, on being informed that an applicant for a policy had been rejected by another company, and had taken the gold cure, contrary to the representations in his application, brought the matter to the attention of the applicant, who explained that he had not been rejected, but had withdrawn his application, and had not taken the gold cure, but had merely gone to the institution to influence a friend to go, and the company issued the policy in reliance on such explanations, it could insist on the original warranties in case the explanations were untrue, but not otherwise.

2. SAME.

A life-insurance company, by issuing a policy with knowledge of the falsity of certain warranties in the application therefor, waives the right to rely on those warranties, but not on others, of the falsity of which it has no knowledge. So *held*, where an applicant stated that he had never been rejected by any company, though he had in fact been rejected by six or seven, and also falsely represented that he had never been attended by a physician, or been an inmate of any infirmary or institute, that he had policies in two other companies, and that no physician had ever given an unfavorable opinion as

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to his insurability, and the company applied to issued a policy after being informed that he had been rejected by two companies, and had taken the gold cure.

3. SAME—GARNISHMENT.

The fact that a life-insurance company, on being garnished by a creditor of a beneficiary, merely filed a disclosure denying any indebtedness, and answered the special interrogatories, without setting up certain breaches of warranty on which it sought to rely until several months afterwards, when it obtained leave of court to file further answers, is insufficient to show a waiver of its right to rely on such warranties.

4. SAME—BURDEN OF PROOF.

In an action founded on a life policy, the fact that the defendant insurance company was given the opening and rebutting in the introduction of testimony, because it had the burden of proving an alleged breach of warranty, did not affect the rule that plaintiff had the burden of proving a waiver of the breach by defendant.

Error to Wayne; Frazer, J. Submitted October 11, 1901. (Docket No. 47.) Reargued May 15, 1903. (Docket No. 80.) Decided June 23, 1903.

Garnishment proceedings by George F. Moore and others, copartners as Edson, Moore & Co., and others, against the Mutual Reserve Fund Life Association, as garnishee of Eva Winans. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

Elliott G. Stevenson, John D. Conely, and *Leo M. Butzel*, for appellants.

Dickinson, Warren & Warren (*Charles B. Warren*, of counsel), for appellee.

HOOKER, C. J. William N. Winans, the husband of Eva Winans, applied to the defendant on October 15, 1895, for a policy of insurance for $10,000 upon his life, payable to his wife. The application contained the usual questions, to which he made answer, and the provision that these answers should be warranties, and avoid the policy if they

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were not in all respects true. There was some delay in the acceptance of this risk by the company, but the policy was finally issued upon January 15, 1896, and sent to its agent, with direction to deliver upon the execution by the applicant of a certificate of good health, which, when executed, contained a reaffirmance that his statements in the application were true and should constitute warranties. The policy was delivered on January 18, 1896.

Winans was accidentally drowned on August 24, 1896, and upon August 25, 1896, a writ of garnishment was sued out in behalf of Edson, Moore & Co. against the defendant insurance company. A disclosure in writing was filed October 9, 1896, denying that, at the time of service, it was in any manner indebted to Eva Winans. It also stated that it had been previously served with similar process at the suit of two other alleged creditors of Eva Winans. On October 19, 1896, interrogatories were filed and served, and, October 26th, the time for answering was extended by stipulation to November 10, 1896, when the answers were filed, admitting the issuance of a policy to Winans for $10,000, payable to Eva Winans, that the last premium was paid August 1, 1896, that it had received papers purporting to be proofs of loss, and that it had no knowledge whether Winans was dead or not. Plaintiffs afterwards demanded a trial of the statutory issue in garnishment. The date of this is not stated.

On July 1, 1897, a motion was made and leave granted to file further answers, which set up in detail the alleged breaches of warranty upon which defendant relied at the subsequent trial, in which it was stated that, at the time when the former answers were made, it was not in a position to set out the breaches of warranty on which it relied. The cause was consolidated with three others of like character, and upon the trial a verdict for the defendant was rendered, by direction of the court, upon the ground that there were "warranties in this application that have been shown to be false, that were never brought to the knowledge of the company, and they never directly

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or by inference waived. Such is the warranty that he never had been treated by any other physician. Such is the warranty in regard to his temperate habits. Such is the warranty in regard to his insurance in other companies." In his charge the learned circuit judge said further:

"It is also claimed that, at the time the proofs of loss were furnished, these facts were known; that is, that the giving of the proofs of loss, handing out this blank, allowing the party to make his proofs, is a waiver of any defenses that they now have or might have had at the time. I do not find under the evidence, as I look at it, that there was any such knowledge at the time these proofs of loss were furnished. Neither do I find that, under the law, the mere giving out of this blank is a waiver of anything.

"Another proposition is that the pleadings in this case prevented the defendant from setting up this defense. The pleadings recited the answers to the interrogatories. I believe now, as I did at the time I admitted those amended interrogatories, that they are part of the pleadings in this case. I see no evidence that they were not made the issue as soon as the company was informed of them."

The plaintiffs have brought error.

Upon the trial the court held that the burden of proof was upon the defendant to show the breach of warranties contained in the contract, and it was made to appear that the application contained the following:

"It is hereby agreed that the answers and statements in this application (parts 1 and 2), whether written by the applicant or not, are warranted to be full, complete, and true, and that this agreement and the constitution or by-laws of the association, with the amendments thereto, together with this application, are hereby made part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete, and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statements or answers

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made or received by any person, or to the association, shall be binding on the association, unless such statements or answers be reduced to writing and contained in this application."

It also contained the following questions and answers:

"9. Has the applicant now any insurance on his life? If so, where, when taken, for what amounts, and what kinds of policies? Company or Association: *Ætna, New York Life, National Union, A. O. U. W., Equitable of Iowa.* Date issued: *1893, 1893, 1893, 1894.* Amount: *$2,000, $10,000, $3,000, $2,000, $20,000.*

"10. Has any proposal to insure the life of the applicant ever been postponed or declined? If so, by what company or association, and for what reason? *No.*

"11. Has any proposal or application to insure the life of the applicant or for membership ever been made to any company, association, or agent upon which a policy or certificate of membership has not been received by you in person for the full amount and kind and at the rate applied for? *No.*

"12. Have you any insurance on your life or membership in any company or association not mentioned in answer to above question No. 9? *No.*

"13. Has any physician given an unfavorable opinion upon the life of the applicant with reference to life insurance or otherwise? If so, state particulars. *No.*

"14. Has the applicant ever had any illness, local disease, injury, mental or nervous disease or infirmity? If yes, state nature, date, duration, and severity of attack. *Never sick in bed a day in my life.*

"15. *A.* How long since you consulted or were attended by a physician? Give date. *B.* State name and address of such physician. *C.* For what disease or ailment? *D.* Give name and address of each physician who has prescribed for or attended you within the past five years, and for what diseases and ailments, and date. *E.* Have you had any illness, disease, or medical attendance not stated above? *A. None. B.* Name, *none.* Address, ——. *C. None. D.* Name, *none.* Address, ——. *E. No.*

"16. Have you used externally or internally any patent, proprietary, or other medicines of any kind within the past two years? If so, what medicines, and for what? *No.*

"17. Has the applicant been an inmate of any infirm-

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ary, sanitarium, institute, asylum, or hospital? If so, where? When? Duration? For what cause? State expressly each and every case. *No.*"

The testimony shows that his policy in the Ætna Company was canceled, for cause, five months before he made the application in this case. He had no policy in the New York Life-Insurance Company. He had a policy in the Independent Order of Foresters for $5,000. He had been rejected by the Home Life-Insurance Company of New York, the Mutual Life Company of New York, the Equitable Life Company of New York, the Mutual Benefit Company of Newark, N. J., the New York Life-Insurance Company, and the Ætna Life Company of Hartford. He had also been rejected by the Berkshire Life-Insurance Company after the application to defendant was first made, but before its reaffirmance. Several physicians of life-insurance companies had given unfavorable opinions and reports. He had been treated by a physician in 1891 for chronic alcoholism, and by the physician in charge of the Keeley Institute, at Northville, from April 29 to May 20, 1892, and by Dr. Brady, in Detroit, in 1894. He had been an inmate of the Keeley Institute for treatment for nearly a month.

These false statements were sufficient to invalidate the policy, unless a waiver or estoppel can be found. *Rhode v. Insurance Co.*, 129 Mich. 112 (88 N. W. 400). There was testimony showing that the defendant had some information indicating the falsity of some of these statements before it issued the policy; *e. g.*, it had ascertained that the Equitable Company had rejected him for some reason unknown to defendant's officers, and that he had been rejected by the Home Life-Insurance Company for the reason that it was informed that he occasionally drank to excess; also that he was insured in the Michigan Mutual Life; also that he had taken the gold cure. There was testimony (undisputed) tending to show that the defendant had no information that other warranties were untrue, and it was shown that, when Winans' attention

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was called to those mentioned, he explained them by saying that he was not rejected by the Equitable and Home Companies, but, becoming annoyed at their delay, withdrew the applications, and he denied taking the gold cure, but explained that he did go to the institute with a friend, solely to influence the friend to go.

It is contended that, by issuing its policy under these circumstances, the company waived not only its right to rely upon the warranties mentioned, but all of the others. If the explanations above stated were true, the warranties to which they apply could not now be insisted upon, but, if untrue, they would be available, and, in any event, the waiver of these would not constitute a waiver of others. The courts have manifested a reluctance to enforce forfeitures in actions upon life-insurance policies, and have applied the doctrines of estoppel and waiver with much strictness against companies seeking to enforce them; but there can be no waiver nor estoppel which does not involve the knowledge by the company of the facts upon which the waiver or estoppel rests. The defendant cannot in this case insist upon a forfeiture based on the fact that Winans was insured in the Mutual Life, because it had notice of the fact, and chose to issue its policy with that understanding. The same would be said regarding its information in relation to the rejections and the gold cure, but for Winans' denial and plausible explanation, upon which the defendant's officers had a right to and apparently did rely.

But, aside from these, there are several other warranties which its officers believed when the policy issued, and these are sufficient to justify a forfeiture, unless subsequently waived either by acceptance of premiums or the failure to seasonably rely upon them in their defense. *Finch* v. *Modern Woodmen of America*, 113 Mich. 646 71 N. W. 1104); *Ferris* v. *Assurance Co.*, 118 Mich. 485 (76 N. W. 1041); *Brown* v. *Insurance Co.*, 65 Mich. 306 (32 N. W. 610, 8 Am. St. Rep. 894); *Ketcham* v. *Accident Ass'n*, 117 Mich. 521 (76 N. W. 5); *Bennecke* v.

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Insurance Co., 105 U. S. 359; *Robertson* v. *Insurance Co.*, 88 N. Y. 541; *Weed* v. *Insurance Co.*, 116 N. Y. 106 (22 N. E. 229); *United States Ins. Co.* v. *Moriarty*, (Tex. Civ. App.) 36 S. W. 943; *Dover Glass Works Co.* v. *Insurance Co.*, 1 Marv. (Del.) 32 (29 Atl. 1039, 65 Am. St. Rep. 264); *Equitable Life-Assur. Soc.* v. *McElroy*, 83 Fed. 631, 28 C. C. A. 365.

The false statements were numerous. He was not insured in two companies that he claimed to have policies from. He had been rejected by four or five companies, though he said he had been rejected by none. Unfavorable reports had been made by physicians in several instances, though he stated no such report had been made. He had been attended by two physicians, contrary to his statement. That these representations were warranties, and may be relied on as such, is beyond controversy. See *Hubbard* v. *Mutual Res. Fund Life Ass'n*, 100 Fed. 719 40 C. C. A. 665, and cases cited.

It is intimated that premiums were received with knowledge of the falsity of the warranties; but we find no evidence of this, nor does it appear that there was a fatal failure to disclose defendant's claim. The disclosure unqualifiedly stated that the defendant was not indebted at the time of service to Eva Winans in any way or manner. It also prudently mentioned the service of earlier writs. The answers filed were responsive to the interrogatories. Before the cause was in readiness for trial, a most complete statement of the breaches relied upon was filed by leave of the court, upon the showing under oath that when the interrogatories were first answered, the defendant was unable to answer fully, as it was then engaged in investigating the subject. In this statement several grounds of defense were stated, some of which were consistent with a primary liability upon its policy, but that fact did not constitute a waiver of others which were stated.

Counsel for the plaintiffs assert that the defendant failed to show that the right to assert a forfeiture was not

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waived, because it failed to prove that it had no knowledge of these breaches when it filed its disclosure or first answers to interrogatories, insisting that there was no proof upon the subject. It appears from the answer filed by leave of court, and the evidence in the case indicates, that the policy was issued in reliance upon the application. There is no presumption of waiver, except when it is based upon facts which tend to imply it, and there are none here. Counsel build up an argument upon the fact that the court gave to the defendant the opening and rebutting in the introduction of evidence, upon the theory that the burden was upon it to prove the breach of warranty. Undoubtedly the burden was upon the defendant to prove this affirmative defense, and in turn the burden fell upon the plaintiffs to prove the waiver or estoppel, and this rule was not affected by the order in which the proofs were made.

These are the main questions raised by the record, which justifies the conclusion reached by the trial judge in directing a verdict for the defendant.

The judgment is affirmed.

The other Justices concurred.

NORTHWESTERN COOPERAGE & LUMBER CO. *v.* BYERS.

CONTRACTS—ASSIGNABILITY.

Defendants entered into a contract with a corporation, whereby the latter agreed to erect a stave factory at a certain place, to operate it as long as the timber supply might warrant, not to buy or pay for its timber through any one merchant, and not to own or be in any way connected with a store or boarding house. Defendants were to furnish and lease free a site for the factory for the period of 10 years, to save the corporation harmless from all taxes assessed against the site, factory, and products during said period, and to

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deliver free, within a short time, a certain quantity of timber. In case the corporation should not operate its factory for 12 months, it was to pay all taxes assessed against its property during the time the factory was not in operation; and the lease was renewable at the option of the corporation, "its successors or assigns." *Held*, that the contract was assignable by the corporation.

Error to Iron; Stone, J. Submitted June 2, 1903. (Docket No. 2.) Decided June 23, 1903.

Assumpsit by the Northwestern Cooperage & Lumber Company against Isaac W. Byers and others on a contract of indemnity against taxation. From a judgment for plaintiff, defendants bring error. Affirmed.

Cook & Pelham, for appellants.

F. D. Mead (*R. C. Flannigan*, of counsel), for appellee.

MOORE, J. This suit was commenced by declaration, to which the defendants demurred. The circuit judge overruled the demurrer, and entered a judgment in favor of the plaintiff. The defendants bring the case here by writ of error.

August 26, 1897, the defendants entered into an agreement with the Buckeye Stave Company. The first part of the agreement provided for the erection of a stave mill at or near Iron River, Mich., to be operated as long as the supply of timber lasts. The portions of the contract material to this issue read as follows:

"That in consideration of the obligations of the Buckeye Stave Company, as above set forth, the undersigned business men, farmers, taxpayers, and residents of Iron River township, Iron county, Michigan, agree that they will furnish and lease the said Buckeye Stave Company the site free already selected by them of from twelve to fourteen acres, level and graded suitable for yard and mill purposes, for their said factory, landing of logs, piling of products, and offices of said factory, for the period of ten years from

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the date hereof, with the privilege of renewing the lease at the expiration of the said ten years for a period of years as long thereafter as said Buckeye Stave Company, their successors or assigns, may use the said mill site for manufacturing purposes, on the same terms and conditions, except that said Buckeye Stave Company, their successors or assigns, shall pay all the taxes assessed against said mill site and property thereon; and further agree that they will save free and harmless said Buckeye Stave Company from all taxes, ordinary and extraordinary, which may be assessed against the factory, buildings, machinery, logs, and manufactured products, and the mill site of said Buckeye Stave Company in the township of Iron River, Iron county, Michigan, during the ten years next ensuing from the date of this agreement; and they further agree that they will deliver free on or before the first day of April, A. D. 1898, at the factory aforesaid of said company, one hundred and fifty thousand feet of merchantable elm logs or their equivalent."

On the 18th of December, 1898, the Buckeye Stave Company assigned this contract to the plaintiff, which last-named company did what the Buckeye Stave Company had agreed in the contract to do. The defendants did not pay the taxes of 1900. Property of the plaintiff was levied upon to satisfy said tax, when plaintiff paid it under protest, and this suit is brought to recover the amount thereof.

The questions involved are so clearly stated by the trial judge in a written opinion filed by him, that we quote therefrom:

"The ground of the demurrer is, 'For the reason that the contract set forth in said count is personal in its nature, and not assignable, and that the pretended assignment thereof to said plaintiff could not confer any rights whatever upon said plaintiff.'

"I have carefully examined the contract, as well as the authorities cited upon the hearing and in the plaintiff's brief, most of which are referred to in 2 Am. & Eng. Enc. Law (2d Ed.), pp. 1034–1037, and notes. I am unable to agree with defendants' position, and am of the opinion that the demurrer should be overruled. Whether the instrument is treated as a lease, an agreement for a

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lease, or a simple executory contract, the conclusion must, it seems to me, be the same. The rule is well stated in Bishop, Cont. § 1182:

"'Not every sort of contract is in its nature assignable. For example, an agreement involving a personal trust in the party, or to be carried out by his personal skill, cannot be so assigned as to compel the other party to accept performance by the assignee, and pay him therefor. A familiar illustration whereof is that a master cannot validly assign over his apprentice. But the right to perform an agreement, and receive the money to be earned thereby, is, when not within this principle of personal confidence, assignable. *Devlin* v. *Mayor, etc., of New York*, 63 N. Y. 8; *Tugman* v. *Steamship Co.*, 76 N. Y. 207. Of this a common illustration is a building contract. And, in general terms, a perfected claim to anything, whether money or goods, may be so assigned as to vest in the assignee the equitable interest, or, in some of the States, the legal.'

"To the same effect, 1 Pars. Cont. *p. 223 *et seq.*, and notes.

"In this case the Buckeye Stave Company agreed with the defendants that it would, on or before the 1st day of January, 1898, erect, or have in process of erection, in or near Iron River, Michigan, and operate thereafter so long as the supply of timber may warrant, a stave and heading factory. It further agreed that it would not buy, or pay therefor, the logs or timber necessary to supply said factory, through any one merchant or business man in the township or village of Iron River; that it would not own, operate, control, or be in any way connected with, a store or boarding house in or near Iron River; and that it would, in case it did not operate the said factory for 12 months, pay all taxes which might be assessed against it on its property during the time in which said factory was not in operation.

"As was said in *Devlin* v. *Mayor, etc., of New York*, *supra*, the contract was not purely personal, in the sense that the company was to perform in person. The things which the company agreed to do or have done were all to be done before the parties of the other part were to pay or save harmless the taxes. In this respect it might be said that its undertakings were conditions precedent to any expenditure by the other party. The company's failure to perform in advance would be a good defense for the other party, and the same may be said of its assignee, the plaintiff. The taxes, in the sense of the authorities, were to be

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earned before there was any obligation on the part of the defendants to pay or indemnify. The principle, it seems to me, is the same as though goods were to be paid for on delivery. I cannot see that the question of the responsibility or solvency of the Buckeye Stave Company was involved. Nor can it be said that the personal performance by the Buckeye Stave Company could have been contemplated by the parties at the time this contract was made. It was a corporation, and must work through its agents, servants, and officers. The work, of necessity, required the labor and attention of a number of men; and it does not appear that, because of the company's knowledge, experience, or pecuniary ability, or for any other reason, it was especially fitted to carry it on. There was nothing of a personal nature about it, and a personal performance by it was not the inducement nor the essence of the contract. *Galey* v. *Mellon*, 172 Pa. St. 443 (33 Atl. 560).

"If the contract be personal, and the performance of the party himself be the essence thereof, it neither devolves upon his representatives, nor can it be assigned. Had the Buckeye Stave Company been a natural person, is there any doubt that, in case of death, the contract would have devolved upon the representative? I think not. I think that the true doctrine is that where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and when the latter has not disqualified himself from a performance of the contract, it is assignable.

"It seems to me that the case of *Arkansas Valley Smelting Co.* v. *Belden Min. Co.*, 127 U. S. 379 (8 Sup. Ct. 1308), can be readily distinguished from the case at bar. That case was one for the delivery of ore to the assignor of the plaintiff. The price was not fixed by the contract, nor payable upon the delivery of the ore. The vendee selected the sample and made the assay, and, during the time between which the ore was delivered and the ascertainment and the payment of the price, the vendor had no security for its payment, except in the character and solvency of the vendee. The court held that the defendant could not, therefore, be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted. But the courts uniformly hold that where goods are to be

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sold and delivered, and paid for on delivery, the vendee may assign the contract, where nothing remains to be done by him but the payment of money. *Delaware County Com'rs* v. *Diebold Safe & Lock Co.*, 133 U. S. 473 (10 Sup. Ct. 399)."

Counsel for defendants, in support of the claim that this contract was not assignable, cite *Globe & Rutgers Fire-Ins. Co.* v. *Jones*, 129 Mich. 664 (89 N. W. 580). We think that case is not in point. The question involved there was whether an employé could be compelled to perform services for a different employer than the one with whom he made his contract, and it was held he could not. See 2 Am. & Eng. Enc. Law (2d Ed.), p. 1037, notes, and cases cited therein. The learned circuit judge so clearly stated the principles of law involved that we content ourselves by citing *Himrod Furnace Co.* v. *Railroad Co.*, 22 Ohio St. 451, and by suggesting that the contract itself contemplated it might be assigned, by providing for a renewal of the lease "for a period of years as long thereafter as said Buckeye Stave Company, their successors or assigns, may use the said mill site," etc.

Judgment is affirmed.

The other Justices concurred.

VINING *v.* DETROIT, YPSILANTI, ANN ARBOR & JACKSON RAILWAY.

STREET RAILWAYS—FRANCHISE—RATE OF FARE.

A street-railway company, operating its road through a village under a franchise therefrom prescribing the rate of fare per mile for travel over any portion of its line, is bound by such rate, as to passengers to or from such village, irrespective of the conflicting provisions of franchises granted by other municipalities.

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Error to Wayne; Carpenter, J. Submitted June 2, 1903. (Docket No. 3.) Decided June 23, 1903.

Case by Edward M. Vining against the Detroit, Ypsilanti, Ann Arbor & Jackson Railway for an unlawful ejection from defendant's car. From a judgment for plaintiff, defendant brings error. Affirmed.

Corliss, Andrus, Leete & Joslyn (*Ray B. Morgan*, of counsel), for appellant.

Thomas Kissane, for appellee.

MONTGOMERY, J. This suit was commenced in the justice court to recover damages for an alleged unlawful ejection from defendant's car. Plaintiff had judgment, and an appeal was taken to the circuit court, where a verdict was rendered by a jury for the sum of $75, and, upon a motion being made by defendant to set aside such verdict as unwarranted by the evidence, judgment was entered for the sum of $40.

Defendant is a street-railway company operating cars between the cities of Detroit and Jackson, through numerous townships, villages, and cities, among others the village of Wayne, situated in the township of Nankin. On the day in question, the plaintiff, a lawyer residing in Wayne, boarded a west-bound car, and tendered six cents as his fare to a point in Canton township called Artley's Corners, about 3½ miles west of Wayne. In order to ride this distance, plaintiff must pass through parts of the village of Wayne and of the townships of Nankin and Canton. The conductor demanded ten cents as fare,—five cents as fare through Nankin and five cents as fare through Canton. Plaintiff refused to pay more than six cents, and the conductor returned one cent, and retained five as fare to the Nankin-Canton town line, where plaintiff was ejected from the car.

The only question for consideration here is the amount of fare to which defendant was entitled. The controversy

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arises over the apparently conflicting provisions relative to fare in the franchises of the townships and villages. Plaintiff claimed the right to ride through portions of the townships of Nankin and Canton upon the payment of fare at the rate of 1½ cents per mile by virtue of the franchise of the village of Wayne, which provides that the company "shall be entitled to charge at the rate of one and one-half cents per mile * * * between any two points on its line between the city of Detroit and the city of Ann Arbor." On the other hand, defendant claimed the right to charge five cents for the ride in Nankin township, and five cents for the ride in Canton township, basing its claim upon the provisions of the franchises of these townships, which are identical as far as they relate to fare. The Nankin franchise provides that "the rate of fare for any distance on the line of said railway within the said township of Nankin shall not exceed five cents, and the rate of fare for any distance on the line of said railway outside of the said township of Nankin shall not exceed two cents per mile."

It is contended by defendant that to permit the plaintiff to rely upon the franchise of the village of Wayne is to give to that franchise extraterritorial effect, and that this cannot be done, and that such construction ought not to be given as to extend the force of the ordinance or franchise beyond the limits of the village. It would seem that we have been unsuccessful in the effort to express ourselves with sufficient clearness in the various judgments rendered against this defendant, although the language employed in our decisions has not been obscure. In the case of *Rice* v. *Detroit, Ypsilanti & Ann Arbor Ry.*, 122 Mich. 677 (81 N. W. 927, 48 L. R. A. 84), we had under consideration a franchise granted by the village of Dearborn, which provided the rates of fare which the defendant company might charge from any point in the village of Dearborn to Woodward avenue in the city of Detroit, and providing that tickets should be kept for sale upon each car operated by the company. We said in that case:

"The franchise is in the nature of a contract, and

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imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce."

It was further said in that case:

"The plaintiff's right under this franchise is not different than it would have been had the franchise in Springwells been silent on the subject of fares. The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate."

Applying that language to the present case, it would seem to decide the case for the plaintiff. To the same effect was the holding in *Coy* v. *Detroit, Ypsilanti & Ann Arbor Ry.*, 125 Mich. 616 (85 N. W. 6). That the defendant has obligated itself to accept, as compensation from any passenger to or from the village of Wayne to or from any point on its road, the rate of 1½ cents per mile, is too clear for argument, and, moreover, has been ruled by the foregoing cases.

Judgment is affirmed, with costs.

HOOKER, C. J., MOORE and GRANT, JJ., concurred. CARPENTER, J., did not sit.

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FLINT LAND CO. *v.* AUDITOR GENERAL.

TAX DEEDS—CERTIFICATE OF ERROR—AUTHORITY OF AUDITOR GENERAL.

Under section 98, subd. 1, of the tax law of 1893 (1 Comp. Laws, § 3921), authorizing the auditor general to issue a certificate of error against a tax deed in case the land was not subject to taxation at the date of the assessment of the taxes for which it was sold, the auditor has no power to issue such certificate solely on the ground that the assessment erroneously included reassessed taxes for a former year.

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Certiorari by the Flint Land Company, Limited, to review the action of Perry F. Powers, auditor general, in issuing a certificate of error against a tax deed. Submitted June 3, 1903. (Docket No. 9.) Certificate vacated June 23, 1903.

McFarlan & Wilson, for plaintiff.

George W. Bridgman, for defendant.

MONTGOMERY, J. This is *certiorari* to review the action of the auditor general in issuing a certificate of error against a tax deed issued to relator on a sale of the land involved for taxes, pursuant to a decree of the circuit court for Berrien county, in chancery.

On April 18, 1901, a deed was made by the auditor general to the Flint Land Company, Limited, of land in the city of St. Joseph described as commencing 44 feet east of the northwest corner of lot 192, and running thence east on Ship street 22 feet; thence southerly, at right angles with Ship street, 66 feet; thence westerly, parallel with Ship street, 22 feet; thence northerly to place of beginning,—for taxes assessed thereon in the year 1895; and at the same time a certificate of purchase was issued for taxes assessed thereon in 1896, and the taxes for the year 1898 were paid; making the total consideration for said land $563.39. It now appears that the sale for the taxes of 1895 also included certain taxes for the year 1893, which were assessed in the year 1893 against property described as "22 ft. by 66 ft., west of east 66 ft. by 66 ft. of lot 192, city of St. Joseph." These taxes assessed in 1893 had been charged to the county by the auditor general for the reason that the description was indefinite. In like manner the sale for the taxes of 1896 contained taxes for 1889 and 1892 that had been assessed against an indefinite description, but undoubtedly the same land purchased by the plaintiff.

Application was made to the auditor general for a certificate of error against said deed, and several reasons

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were alleged in favor of granting such certificate; one being that the land was not subject to taxation at the date of the assessment of the taxes for which it was sold, for certain sums included with the taxes which were returned for 1895 and 1896, and that, said sale being made for a total sum for taxes of 1895 and 1896, and for each of said years that were included in the return, in excess of authority, such sale was in contravention of the provisions of the general tax law, and is for that reason void. Objection was also made that the 1896 tax included some few cents interest on a reassessed tax. Objection was also made that a certain tax is mentioned as "R. R. J. Tax." Also objection is made that certain taxes originally assessed as bridge tax are reassessed as viaduct tax. Another objection is made that in the published list for 1895 the reassessed taxes of 1893 and the regular tax of 1895 were included together, and advertised under the head "1895 Taxes;" that is, the publication did not specify that a part of the 1895 tax was a reassessed tax of 1893.

The auditor general issued a certificate of error against the deed upon payment of $277.87, on the ground that the land was not subject to taxation, and presumably the balance of the $563.39 was charged to the county; and this action is brought to review his decision. The Flint Land Company, Limited, having served the statutory notice upon G. Hilton Scribner, of Yonkers, N. Y., owner of the property, and as the six months would expire before a final decision could be arrived at by this court, it has been stipulated that the owner shall have the right to pay the statutory amount at any time within 30 days after the final determination of the case.

Since the action taken by the auditor general in this case, our decision in *Cole* v. *Auditor General*, 132 Mich. 262 (93 N. W. 890), has been handed down. It will be apparent from a reading of that decision that the action of the auditor general had in this case cannot be sustained, unless it be under the authority conferred by the first subdivision of section 98 of the tax law (1 Comp. Laws, §

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3921) to vacate a sale in case "the land so sold was not subject to taxation at the date of the assessment of the taxes for which it was sold." It is argued that as the assessment of 1895 included an item for reassessed taxes of 1893, and as it appears that there was no jurisdiction to assess the tax of 1893 against this land at that time (*i. e.*, in 1895), the land was not, as to those taxes, subject to their assessment, and the auditor general has authority under this section to set aside the proceeding. We cannot assent to this view. The taxes were *in fact* assessed against the property in question in 1895. At that time the land in question was subject to assessment. If we were to hold that the decree of the chancery court might be vacated by the auditor because there was included this item of taxes, it is difficult to conceive why the auditor general may not in any case review a decision of the court, and determine whether an item is included which the authorities had not the authority in the first instance to assess against the property in question. Such a view leaves out of account the binding force of the decree of the chancery court. Notice that a decree is asked for an aggregate amount is given. On the day of hearing, it is incumbent on the taxpayer to appear and assert any defense that may be open to him, and the defense in this case would have been that there was included in this aggregate an item which was included in the amount without authority of law. No such defense was attempted. This decree the auditor general cannot disturb.

The provisions of section 98 of the general tax law were first enacted by Act No. 136, Laws 1863. That statute was construed by this court as early as 1874, in the case of *People, ex rel. Rice*, v. *Auditor General*, 30 Mich. 12. It appeared in that case that certain ditch taxes, which made up the larger part of the tax for which the land was sold, were illegally assessed. It was sought to compel the refunding of the tax. The court, in construing this provision, said, "If the land was subject to assessment, and if taxes had been actually assessed, whether legally or

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illegally, and no attempt had been made to ascertain and pay them, no provision was made for refunding." This authoritative construction should be read with section 98 of our present tax law, and would be decisive if the question were more doubtful.

The action of the auditor general must be vacated and held for naught. As the question involved is one of public interest, no costs will be awarded.

The other Justices concurred.

TOWNSHIP OF DECATUR *v.* COPLEY.

1. TAXES—SUIT FOR COLLECTION—TAX ROLL—PRIMA FACIE EVIDENCE.

   The provision of 1 Comp. Laws, § 3870, that, in a suit for the collection of a tax, the tax roll shall be *prima facie* evidence of the debt sought to be recovered, does not conflict with a taxpayer's constitutional rights.

2. SAME—AUTHORITY OF SUPERVISOR.

   Under 1 Comp. Laws, § 3870, providing for the collection of taxes by the township treasurer, by virtue of the warrant issued by the supervisor, by distress and sale, and authorizing him, if otherwise unable to collect a tax on personal property, to bring suit therefor, the authority of the treasurer, during the lifetime of his warrant, is exclusive, and suit cannot, within that period, be brought by the supervisor, under 1 Comp. Laws, §§ 2336, 3863, for the collection of a tax covered by the warrant.

Error to Van Buren; Carr, J. Submitted June 5, 1903. (Docket No. 58.) Decided June 23, 1903.

Assumpsit by the township of Decatur against Edwin B. Copley for taxes. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

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A. L. Moulton and *David Anderson*, for appellant.

T. J. Cavanaugh and *L. A. Tabor*, for appellee.

MONTGOMERY, J. This action was brought to recover for taxes assessed against the defendant in the plaintiff township in the year 1901. While the tax warrant was still in the hands of the township treasurer, and before the day fixed by law for its return to the county treasurer, this suit was commenced by authority of the supervisor, and without authority of the township treasurer. The circuit judge held that the suit could not be instituted by the supervisor while the warrant still remained in the hands of the township treasurer, and before the time fixed for the return; that during this period the law commits to the treasurer the duty of collecting the tax, and the supervisor has no duty to perform in connection therewith, and no authority to act in the premises. The court also held that the burden of proof rested upon the plaintiff to show that the defendant was a resident of Decatur township at the time the assessment was made. The two questions indicated by the holding above stated are those presented for our consideration.

The statute (1 Comp. Laws, § 3870) makes the tax roll *prima facie* evidence of the debt sought to be recovered, and this provision is not in conflict with defendant's constitutional rights. *Wattles* v. *City of Lapeer*, 40 Mich. 626; *State Tax-Law Cases*, 54 Mich. 385 (20 N. W. 493); *City of Muskegon* v. *S. K. Martin Lumber Co.*, 86 Mich. 629 (49 N. W. 489).

The important question is whether the supervisor was entitled to bring this action while the tax roll was still in the hands of the township treasurer. We have held that inasmuch as section 3863, 1 Comp. Laws, provides that taxes, when assessed, shall become at once a debt to the township, the supervisor, being authorized by section 2336, 1 Comp. Laws, to bring suits on behalf of the township, may sue for this debt in the name of the township. *Township of Bangor* v. *Transportation Co.*, 112 Mich.

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601 (71 N. W. 143); *Township of Deerfield* v. *Harper*, 115 Mich. 678 (74 N. W. 207). In each of these cases, however, the suit was brought after the period fixed by law for the township treasurer to collect the tax. While we held in these cases that the failure of the township treasurer to make a return such as would justify the issuing of a new warrant did not discharge the debt, the question presented by the present record as to whether, during the period fixed by law for the collection by the township treasurer, his control of the tax roll, combined with authority to bring suit in certain cases, is exclusive of a similar right in the supervisor, was not discussed or presented.

Under a prior tax law, it was held in numerous cases that the warrant of the collector must be exhausted before suit could be brought. *Staley* v. *Township of Columbus*, 36 Mich. 38; *McCallum* v. *Township of Bethany*, 42 Mich. 457 (4 N. W. 164); *Putman* v. *Township of Fife Lake*, 45 Mich. 125 (7 N. W. 699); *City of Detroit* v. *Jepp*, 52 Mich. 458 (18 N. W. 217). It was said in *Staley* v. *Township of Columbus* that the tax roll is itself as complete and adequate as an execution on a judgment would be, if there be goods and chattels within the treasurer's jurisdiction. And in *McCallum* v. *Township of Bethany* it was said that the warrant is in the nature of an execution for the collection of the taxes, and the remedy for their collection under it must be exhausted, and the taxes returned unpaid, before suit can be brought to recover them.

Plaintiff's counsel say that these authorities should not be held to apply, for the reason that section 1049, 1 How. Stat., is not embodied in our present tax law, and that it was this section which placed the limitation upon the right to sue. There is some force in this contention, but we understand the general rule to be that the usual process for collecting taxes is by the tax warrant, and that the courts will not ordinarily allow their process to be used for that purpose when the statute provides other remedies. 21 Am. & Eng. Enc. Pl. & Pr. p. 380. This is especially true

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where, at the time of the remedy sought to be invoked, the statute has prescribed a proper mode of procedure. Under our present statutes it is provided that a warrant shall issue to the township treasurer for the collection of the tax; and section 3870 provides for the seizure and sale of the property of the taxpayer upon his failure to make payment within the time prescribed, and also provides that the township treasurer, if otherwise unable to collect a tax on personal property, may sue the person to whom it is assessed, in the name of the township, village, or city, and garnishee any debtor or debtors of such person. In other words, the law providing for the collection of taxes commits for a certain period of time the collection of these taxes to the township treasurer, and prescribes the ways and means for collecting them; and while it is true that under the authority of *Township of Deerfield* v. *Harper* and *Township of Bangor* v. *Transportation Co.*, *supra*, the debt may be collected by means of a suit instituted by the supervisor upon a failure of the township treasurer, within the life of his warrant, to accomplish that result, we see no reason for holding that the legislature intended a double remedy, or that the taxpayer should be harassed by two suits or two proceedings at one and the same time. We think that, during the period fixed by section 3870, the authority of the township treasurer must be held exclusive, and that suit cannot be instituted during this time by the supervisor.

It follows that the judgment will be affirmed, with costs.

The other Justices concurred.

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PEOPLE *v.* MORGAN.

1. CRIMINAL LAW—GRAND JURY—VALIDITY OF INDICTMENT.
   Though the statute (3 Comp. Laws, § 11885) contemplates that a grand jury will complete its work during the term to which it is summoned, yet, when it is continued into the next term, and is recognized by the court as a valid jury in receiving its indictments, it is a *de facto* grand jury, and its indictments are not void.

2. SAME—MOTION TO QUASH—CHALLENGE TO ARRAY.
   An indictment of a *de facto* grand jury, not being void, cannot be set aside on motion to quash or by challenge to the array. 3 Comp. Laws, § 11882.

Exceptions before judgment from Berrien; Coolidge, J. Submitted June 12, 1903. (Docket No. 155.) Decided June 23, 1903.

Orlando Morgan was convicted of violating the liquor law. Affirmed.

O'Hara & O'Hara, for appellant.

Charles A. Blair, Attorney General, and *I. W. Riford*, Prosecuting Attorney, for the people.

MONTGOMERY, J. The sole question presented in this case is whether an indictment returned by a grand jury which was summoned for and sworn at one term of court, and continued its work into the next, and was recognized by the court as a valid jury in receiving the indictment in question, should be vacated and set aside on the ground that the grand jury is *functus officio* at the end of the term for which it is chosen.

That the statute contemplates that the work of the grand jury will be done during the term to which it is summoned is apparent. 3 Comp. Laws, § 11885. Does it follow that, when the jury has in fact been continued into the next

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term, its proceedings are void? This question was considered by the supreme court of Wisconsin in *State* v. *Noyes*, 87 Wis. 340 (58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45), and the conclusion reached that the *de facto* doctrine applies to the acts of a grand jury, and it was so applied in a case precisely analogous to the present. We quote from the language of Chief Justice Orton:

"It is contended that this body became *functus officio* as a grand jury on and after the last day of the September term. It was recognized by the court as a lawful grand jury, and the court received the indictments found by it, and finally discharged it from further service and ordered the payment of its fees. The legal grand jury of the September term simply held over its term. There cannot be a more appropriate application of the *de facto* doctrine than to such a body as a grand jury *de facto* while thus holding over and doing business in the October term of the court."

It is truly said by respondent's counsel that the question there arose collaterally, but it will be noted that the court deemed it necessary to determine whether the acts of such a body were valid, and decided that question in the affirmative. In that opinion we concur, and have so announced in *People* v. *Reigel*, 120 Mich. 78 (78 N. W. 1017).

The acts of this jury not being void, may they be set aside on a motion to quash, or by challenge to the array? This question is answered in the negative by 3 Comp. Laws, § 11882, and the prior decisions of this court. See cases collated in *People* v. *Reigel*, *supra;* and see, also, *People* v. *Thompson*, 122 Mich. 415 (81 N. W. 344).

The conviction is affirmed, and the circuit court directed to proceed to judgment.

The other Justices concurred.

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McINTYRE *v.* PFAUDLER VACUUM FERMENTATION CO.

1. NEGLIGENCE—DANGEROUS PREMISES—PLATFORM SCALES—DEFECTS—INVITATION TO USE—LIABILITY.

   Plaintiff, an employé of a cartage company, while engaged in hauling steel to defendant, drove upon a platform scale on its premises, for the purpose of weighing his load, and was injured by the platform's giving way. The platform was adjacent to the premises of another corporation, the beam of the scales being in its office; and the scales were used in common by it and defendant. The actual ownership of the scales seemed to be in some doubt. *Held*, that defendant's liability did not depend on its ownership of the scales, but, having impliedly invited plaintiff to use them, it was responsible for defects which, by the exercise of due diligence, it could have remedied.

2. SAME—EVIDENCE—QUESTION FOR JURY.

   In an action for injuries caused by the giving way of a platform scale, alleged to have been due to the rotten condition of the supporting timbers, evidence examined, and *held* not to show conclusively that the timbers were renewed within the time claimed by defendant; making the question of its negligence, in not discovering and remedying the defect, one for the jury.

3. SAME—CONTRIBUTORY NEGLIGENCE.

   Whether plaintiff was guilty of contributory negligence in overloading the scales, or in not properly distributing his load, was also for the jury.

4. SAME—INSTRUCTIONS.

   Where all of the testimony in such action tended to show that timbers of the character of those in question might reasonably be expected to last at least five years, an instruction authorizing the jury to find defendant negligent "if ordinary experience ought to have advised a reasonably prudent man that the timbers would not remain sound for a period of a little more than four years" was erroneous.

Error to Wayne; Brooke, J. Submitted April 8, 1903. (Docket No. 9.) Decided June 23, 1903.

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Case by John McIntyre against the Pfaudler Vacuum Fermentation Company, impleaded with the Detroit Safe Company, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Orla B. Taylor and *Gray & Gray*, for appellant.

Hayes & Lawson and *Tarsney & Fitzpatrick*, for appellee.

CARPENTER, J. This is the second time this case has been before this court. The facts will be found fully stated in the former opinion, reported in 129 Mich. 385 (89 N. W. 39). On the second trial a verdict was directed in favor of the Detroit Safe Company, and the plaintiff obtained a verdict and judgment against the Pfaudler Company. The latter company asks this court to reverse that judgment, for several reasons. It is claimed that the trial court should have directed a verdict in its favor on several grounds, viz.: *First*, the obligation to keep the scales in repair rested, not upon it, but upon the Detroit Safe Company; *second*, the undisputed testimony conclusively proved that the defective timber which caused the injury was put in new in 1893, that it was then sound, and that no rule of diligence required its inspection before plaintiff was injured; *third*, it is claimed on this record, as on the former record, that plaintiff's load was too heavy for the scales, and not properly distributed, and that this was the occasion of plaintiff's injury; *fourth*, it is claimed that the court erred in instructing the jury in the particular hereafter mentioned in this opinion.

1. Did the obligation to keep the scales in order rest upon the Pfaudler Company, or upon the Detroit Safe Company? The platform of the scales was in a private alley, about 12 feet wide, situated between the building occupied by the Pfaudler Company, on the east, and that occupied by the Detroit Safe Company, on the west. The beam of the scales was in the office of the Detroit Safe Company. The scales were originally the property of the

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Detroit Safe Company, and it put these scales in the alley in 1890, while it had possession of the same under a lease from the Wesson estate. March 1, 1895, the safe company assigned this lease to James Sargeant, and on April 10, 1895, Sargeant assigned the same to the Pfaudler Company. At the time the lease was transferred to Sargeant, the safe company also delivered a bill of sale to him of "all of the property known as the tank department of the Detroit Safe Company, including all tools and machinery and materials belonging to said department." To this bill of sale were annexed schedules and inventories of the property conveyed. These did not mention the scales. After the transfer, the scales were looked after and controlled by the safe company, though both the safe company and the Pfaudler Company used the same, without asking the permission of either. It is claimed by defendant, and its manager testified, that the scales remained the property of the Detroit Safe Company.

In our judgment, the liability of the Pfaudler Company does not depend on its ownership of the scales. At the time of the injury, plaintiff was an employé of the Shedden Cartage Company, engaged in conveying a load of steel to the Pfaudler Company. He was on the premises of the Pfaudler Company, using the scales, to fulfill a contract in which said company and himself each had an interest. Under these circumstances, defendant owed to plaintiff the obligation which an occupier of premises owes to one doing business with him on those premises by his invitation. The law which determines this obligation seems to have been settled in the case of *Indermaur* v. *Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311. Plaintiff in that case was injured on defendant's premises, while there "on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest." Said the court:

"We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation,

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express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class. * * * The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know, and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact. * * * There was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business."

It is true that in the foregoing case the occupier knew of the alleged defect. But the principle of the decision would hold him responsible for defects not known to him, if due diligence on his part would have discovered and remedied them. Cooley, Torts, p. 605; *Campbell* v. *Sugar Co.*, 62 Me. 552 (16 Am. Rep. 503); *Henkel* v. *Murr*, 31 Hun, 28; *Pittsburgh City* v. *Grier*, 22 Pa. St. 54 (60 Am. Dec. 65).

2. Did the evidence warrant the jury in finding that due diligence would have discovered and remedied the defective timber before plaintiff's injury? Defendant claims that the testimony conclusively proves that the scales were thoroughly overhauled, and new timbers put in, in October, 1893, and that the testimony conclusively proves that, according to experience, these timbers would not decay as early as January, 1898, the date of plaintiff's injury, and therefore that defendant was entitled to a verdict. It is true that one Adolph Marschner, an expert scalemaker, does testify that these scales were rebuilt of new timber in

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1893. But he also testifies that Mr. Paige, the manager of the safe company, was around at that time. Mr. Paige testifies that he does not know whether or not the timbers were taken out, and new ones put in, and that he supposes these timbers were put in in 1890. The bill presented by Mr. Marschner's employer, for his services, was for "taking out, repairing, putting in, and repairing wagon scale." An account was introduced in evidence, containing a charge against the safe company for lumber furnished by a lumber company for repairing these scales. That bill contains no items for timber answering to the description of what was claimed to be defective. We cannot, therefore, say that the fact that these timbers were put in in 1893 was conclusively established. We think the testimony not only failed to prove conclusively that these timbers were put in in 1893, but left the date when they were put in very uncertain. While Mr. Paige testifies that he thinks they were put in in 1890, at the time the scales were placed in the alley, he also testifies that he was away at that time, and therefore his testimony cannot be regarded as conclusive. He also testifies that "the scale ought to last five or six or seven years; it depends upon circumstances. It might last ten or fifteen years." Whether proper diligence on the part of the defendant should have led to an examination of the timber, and discovery of the defect, therefore, was, in our judgment, properly submitted to the jury.

3. Whether or not plaintiff's load was too heavy or improperly distributed was, according to the decision on the former hearing, a question for the jury. We do not think any such different question is presented by this record as to demand a different decision.

4. The court charged the jury:

"If you find either that the sticks were not put in new in 1893, or that ordinary experience ought to have advised a reasonably prudent man that sticks of timber of that character, situated as they were, would not remain sound for a period a little more than four years, then the negli-

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gence of the defendant the Pfaudler Company will have been established, provided you determine that the accident occurred by reason of the rotten character of the stringer."

All the testimony in the case tended to prove that such timber would last at least five years. There was no testimony which would warrant the jury in finding that "ordinary experience ought to have advised a reasonably prudent man that sticks of timber of that character, situated as they were, would not remain sound for a period a little more than four years." It is not true, as contended by plaintiff's counsel, that the fact, if it was a fact, that these timbers decayed in four years and three months, would afford "evidence that common experience had shown that they would not last as long or longer than that." A single instance is no evidence of common experience. The jury were therefore invited by this charge to base their verdict upon facts or information not contained in the sworn testimony, and the charge was therefore erroneous.

Complaint is also made of remarks made by plaintiff's counsel in his argument to the jury. These remarks were improper. As the case must be reversed for the error already pointed out, we refrain from deciding whether or not these remarks constituted reversible error.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

GREENFIELD v. DETROIT & MACKINAC RAILWAY CO.

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1. RAILROADS—PASSENGERS ON FREIGHT TRAINS—RULES.
   Railroad companies have the right to prescribe the conditions on which passengers may ride on freight trains.

2. SAME—VIOLATION.
   One riding upon a freight train by arrangement with the conductor, contrary to a rule of the company known to both, is not a passenger.

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3. SAME—PERMITS TO RIDE—WAIVER.

A railroad company may waive a rule forbidding the carrying of passengers on freight trains without a permit, by a long-continued disregard thereof.

4. SAME—EVIDENCE—QUESTION FOR JURY.

In an action for injuries received while riding on defendant's log train, in which it appeared that a rule of the company required persons so riding to have permits, plaintiff testified that he frequently rode without them, and had so ridden when defendant's train-master was aboard; that he had not obtained a permit for a long time, and had never been refused passage. Others testified that it was customary to ride without them, on the payment of fares. The fares and mileage collected were reported to the company. *Held*, to warrant the jury in finding that the rule had been waived.

5. SAME—TRIAL—IMPROPER REMARKS OF COUNSEL.

In an action against a railroad company for injuries to a passenger, defendant's attorney asked plaintiff's attorney to admit that the conductor was killed in the same accident; and plaintiff's attorney replied that "there is no question about that, and it is a fact that the railroad company settled with the widow." *Held*, that as the trial court, on exception by defendant, immediately stated that the remark was improper, ought not to have been made, and must not be considered by the jury, the judgment would not be reversed therefor.

6. SAME—NEGLIGENT LOADING OF CARS—DEFECTIVE APPURTENANCES—QUESTIONS FOR JURY.

In an action for injuries to a passenger on a log train, caused by the derailment of a car, evidence examined, and *held* to raise a question for the jury:

(1) As to whether logs not chained were properly loaded.

(2) As to the existence of a defect in a car wheel that a proper inspection would have disclosed.

7. SAME—INSTRUCTIONS.

A refusal to instruct that "if plaintiff was a passenger on defendant's log train, and the accident which caused his injury occurred while the train was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, then plaintiff cannot recover," was not prejudicial error, in view of the explicit instructions given as to the particular acts of negligence relied on.

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Error to Alpena; Emerick, J. Submitted June 4, 1903. (Docket No. 26.) Decided June 23, 1903.

Case by William Greenfield against the Detroit & Mackinac Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Defendant did a large business transporting logs on its road north of Alpena. Plaintiff was a lumber scaler, and attended to the purchase and shipment of logs over the road. He had been so employed during the seasons for lumbering for about 4½ years previous to January 21, 1900, when he was injured. He testified that he was thus occupied for about 27 months, and that he then rode on these log trains on an average of 10 times per month.

On January 21, 1900, defendant sent a train of 21 cars, with a competent crew, to Miller's Spur, on the Cleveland branch of its road, to be loaded with logs. Some of the cars were loaded with maple logs, and others with peeled hemlock logs. Plaintiff entered the caboose for carriage to Alpena. During the run, a log fell from one of the cars in front of the caboose. The forward end struck a stump, and the other end struck the axle of one of the wheels under the caboose, derailing it. Plaintiff immediately went on the flat car in front, which had only one tier of logs on the forward end. It was necessary to leave the end of the car next to the caboose free, in order to use the brakes there if circumstances required. When the caboose struck the switch, it was overturned, and carried the car in front with it, injuring the plaintiff.

The defendant carried passengers, and had mixed trains for that purpose; that is, freight trains with a passenger coach attached, and running on schedule time.

Plaintiff brought suit for damages, claiming negligence on the part of defendant. The negligence relied on to sustain the judgment is the improper loading of the logs, and a defective wheel under the caboose. The record presents three questions for determination: (1) Was plaintiff a

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passenger? (2) Should the judgment be reversed for the improper language used by plaintiff's attorney upon the trial? (3) Was the defendant guilty of negligence? The facts, so far as essential, are stated in connection with each question discussed.

Charles R. Henry and *T. A. E. & J. C. Weadock*, for appellant.

Dafoe & Scott and *W. H. Simpson*, for appellee.

GRANT, J. (*after stating the facts*). The important question in the case is the first one.

1. The defendant had verbally instructed the conductors of its log trains to carry no passengers thereon without a permit, and the court so instructed the jury. The contention of the defendant is that plaintiff had knowledge of this instruction, and knew he had no right to ride upon this train as a passenger. The contention of the plaintiff is that he did not know it. It is true that plaintiff at one time knew permits were required, for he admits that he obtained at least 30. He, however, testified that he did not know that imperative instructions were issued to that effect; that he frequently rode without permits, and had so ridden when defendant's train-master was aboard, sometimes paying his fare in money, and again by mileage; that others did so, and that he had not obtained a permit for a year and a half before the accident; that he had never been refused passage by any conductor; and that he entered the caboose, intending to pay his fare. There was also evidence from other witnesses that it was customary for persons to ride on these trains without permits, upon payment of fares. The fares and mileage collected were reported to the company.

There is no doubt as to the law. Railroad companies may prohibit the carriage of passengers upon their freight trains, or prescribe the conditions upon which they may ride thereon. *Thomas* v. *Railway Co.*, 72 Mich. 355 (40 N. W. 463); *Randall* v. *Railway Co.*, 113 Mich. 115 (71 N. W. 450, 38 L. R. A. 666).

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Plaintiff could not become a passenger by making an arrangement with the conductor to permit him to ride, contrary to a rule of the company known to both. *McVeety* v. *Railway Co.*, 45 Minn. 268 (47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728).

The theory upon which this case was submitted to the jury was that the defendant had waived this rule, and that plaintiff was justified in so believing. That railroad companies may, through a long-continued, open, and notorious disregard of their rules by their employés, waive their enforcement, is well established. The instructions of the court upon this question were full and explicit, and it is not necessary to quote them. Counsel do not criticise them, their sole claim being that there was no evidence upon which to base such instructions. We think the question was properly submitted to the jury.

2. The conductor of the train was killed in the same accident. For the purpose of laying the foundation for objecting to testimony as to facts equally within the knowledge of plaintiff and the conductor, the defendant's attorney upon the trial asked the plaintiff's attorney to admit that the conductor was killed, to which plaintiff's attorney replied: "There is no question about that, and it is a fact that the railroad company settled with the widow afterwards for it." Defendant's counsel excepted to the remark, and the judge immediately stated that it was improper, ought not to have been made, and must not be considered by the jury. Defendant's counsel urge this as reversible error. If the presiding judge had not promptly and emphatically censured the plaintiff's attorney for making the remark, and told the jury that they must not consider it, it would have been error, within many decisions of this court. Such remarks are designed to prejudice the jury, else they would not be made. My Brethren are of the opinion that, under the circumstances, the case should not be reversed for this error, and I reluctantly assent to their opinion.

3. Defendant's counsel insist that the evidence conclu-

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sively establishes the fact that the logs were properly loaded. Experienced lumbermen, and other experienced persons in transporting logs by cars, witnesses for the defendant, testified that there were two methods of loading cars,—one with the use of chains, and the other without chains; that there is no difference between the two in respect to safety; and that the main object in using chains is to carry larger loads. The chains are bound over the top of the logs, and then other logs are placed loose on top of them to bind the load. They also testified that logs, when properly loaded, sometimes fell off. One of the defendant's witnesses testified that, "if loaded properly, they should be chained.

"*Q.* Are chains always used?
"*A.* No, sir.
"*Q.* What other way is there for loading properly?
"*A.* Well, they put in stakes of proper lengths, and proper kind of wood; and then, of course, in loading with stakes, without chains, they could not be loaded so heavy.
"*Q.* What is the purpose of using chains?
"*A.* Well, to put on a bigger load."

Defendant also introduced evidence that, at the time of the trial, chains were no longer used. The hemlock logs upon this train—at least, those on the car immediately in front of the caboose—were peeled. It is manifest that, in case of a sudden jar upon stopping or starting the train, they would slip more readily than when chained, and more readily than would logs with bark on them. In view of this fact, and the testimony above quoted, we are not prepared to hold, as an undisputed fact, that these logs were properly loaded.

4. There was testimony introduced by plaintiff tending to show that a piece of the flange, about 19 inches in length, was broken out of one of the wheels under the caboose, and that there was an old crack in the outer rim at the place where the break occurred. One of the witnesses, who examined the wheels about 12 hours after the accident, testified:

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"I noticed one wheel that was broken. It was nearest to the switch towards Onaway. It had the appearance of being the first one that went off. It came off the rear end of the way-car. The flange to it was broken off. There was about 19 inches broken off.

"*Q.* State how it was broken, and, after it was broken, how it left that part of the wheel.

"*A.* Well, on the flange it had about three-quarters of an inch of rust on it; looked like an old crack; and it struck something and knocked the rest of it.

"*Q.* After it was broken off the wheel, how did it leave the wheel itself?

"*A.* Left the wheel so it had no flange to hold it on the rail for 19 inches.

"*Q.* You examined the wheel, did you?

"*A.* Yes, sir.

"*Q.* Could you find the flange?

"*A.* No; we looked for it, but couldn't find it.

"*Q.* As it was broken off on the wheel, how was the break? State how it looked.

"*A.* Well, it looked as though it was a crack in it, and it got rusted by the weather, or something made it rusted three-quarters of an inch deep. * * * The rest of the break was bright."

The court instructed the jury that if this "was an essential element in the happening of the accident,—that it would not have happened without it,—and that it could have been observed by a proper inspection, the defendant would be negligent in that regard." We think there was evidence justifying the submission of this question to the jury.

5. Complaint is made of the refusal of the court to give the following instruction:

"If the plaintiff was a passenger upon the defendant's log train, and the accident which caused his injury occurred while the train in question was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, then plaintiff cannot recover."

As a general statement of the law, the request is sound. It is subject to criticism, in that it omits any reference to

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the specific acts of negligence alleged and relied upon. In view of the explicit instructions of the court upon the subject of the defendant's negligence, we think the refusal to give this request not prejudicial. The court distinctly instructed the jury that if the logs were properly loaded, or if they were liable to fall off when so loaded, plaintiff could not recover. There was no question about the equipment of the train or the method of operating it. The sole acts of negligence charged were the two, and to these alone the jury were specifically directed.

Judgment affirmed.

The other Justices concurred.

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MILLER *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

RAILROADS—INJURY TO EMPLOYÉ—SIDE TRACKS—OPEN DRAIN—ASSUMPTION OF RISK.

A brakeman, while running backward on a side track, adjusting the coupling on a car, was tripped by stepping into an open drain under a switch, run over, and killed. The drain had been there for years, and the brakeman had been in the employ of the railroad for more than a year, as a member of a switching crew which daily stopped at the siding for dinner, and put in or took out cars there four or five times a day. No complaint had ever been made by him as to the condition of the drain. *Held*, that he had assumed the risk.

Error to Wayne; Brooke, J. Submitted October 10, 1902. (Docket No. 42.) Decided June 30, 1903.

Case by Christine Miller, administratrix of the estate of John Miller, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company, for negligently causing the death of plaintiff's intestate. From a judgment for

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defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Plaintiff's decedent was a brakeman in the employ of the defendant. The accident by which he met his death occurred in the defendant's yard near Ferry avenue, in the city of Detroit. At this place were two main tracks and a siding known as "Wilson Siding." About 200 feet north of Ferry avenue are two switches. Underneath these switches was a drain about ten inches deep and eight inches wide. This drain led into an open ditch by the side of the roadbed, which was from two to three feet deep. The drain was necessary in order to keep the water away from the switches and permit their free and proper use. The ground was covered with snow to the depth of six or eight inches. While the deceased was running backwards, in the manner hereinafter stated, he fell, was run over by the car, and killed. The negligence alleged is the maintenance of this open ditch and permitting it to be covered with snow; the claim being that the deceased stepped into this ditch and fell.

Decedent was a man of 18 years' experience in railroading. He had worked as a member of this switching crew for a year or so previous to the accident. As such his work extended over all the yards in Detroit. This open drain had existed for years, and had been cleaned out and deepened two inches in the month of November previous to the accident. The crew generally tied up at the Wilson siding for dinner. They went there every day, and sometimes four and five times a day, to put in or take out cars. On the morning of the accident the conductor informed the crew that he wanted to get a car off this Wilson siding. The train was left south of Ferry avenue, and the crew ran up with the engine over the switch, and came down on the Wilson siding, and coupled onto 13 cars. One of these was then thrown out on the main track, and the engine, with the other 12 cars, pushed back onto the siding. After the thirteenth car was thrown out onto the

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main track, McGar, the other brakeman, gave Miller the signal for a lost link; *i. e.*, that it was necessary to get a link somewhere to make the coupling with the cars which they were going in on the Wilson siding to get. On receiving the signal, Miller went to the north end of the car that had been shoved out onto the main track, took the link out of that car, and then started northerly to meet the cars which were being shoved south in on the Wilson siding, walking about 200 feet before meeting them. The engine was north of the 12 cars, headed towards the city, pushing the cars in towards the cars standing on the Wilson siding, which were 400 to 500 feet distant. When he met the backing cars, he went in front of the first car, and ran backwards with it, fixing the coupling, for about 50 feet, when he slipped and fell, the car passing over him, and killing him instantly. He might have walked back between the main track and the side track, or he might have ridden back,—there being a step on the side of the backing car on which he could have stood,—to the place where the cars which were to be coupled onto stood. In either case he could have stopped the backing train by signaling McGar if he had walked back, or by himself signaling the engineer if he had ridden back; the engineer being subject to the signal of either. Either way would have been safe. Instead of adopting either of these ways, he walked north 200 feet, and then ran backwards in front of a car moving 5 to 6 miles an hour, in an attempt to fix the coupling. If he had not been injured, he would have had to walk or ride back 400 to 500 feet to get to the car to be coupled onto.

The rule of the company prohibited doing the work in the manner it was done by the deceased; but it is urged by the plaintiff that the custom of the employés to do the work in this manner was known to the company, and that such custom had abrogated the rule. The court, when the plaintiff had rested her case, directed a verdict for the defendant. In directing a verdict the circuit judge said:

"I do not think that any kind of testimony on behalf

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of the railroad employés as to the breach of rule 24 in going between moving cars for the purpose of coupling or uncoupling would come within this case. The cars to be coupled were, at the time that he went in front of this car, at least 500 feet apart. The coupling could be made 400 feet south of where he was when he started north. There was absolutely no necessity for him to go towards that moving train. Nobody had ordered him to do it. He simply took that course entirely voluntarily and on his own motion. He could have gone south, and at a brisk walk could have been where the two cars would have come together, the 12 cars in motion being then 250 feet north of him. After he had got to the track he could have started south, or he could have remained standing where he was, and boarded the car as it passed him, and waited until the cars had slowed up nearing the other train. It is undoubted that brakemen will, as two cars come together, frequently step between; but it does not appear to me that any amount of testimony that it was a common practice for brakemen to go in front of cars moving 5 or 6 miles an hour, when the coupling to be made is 500 feet away, and go backwards or run sideways in front of a moving train of 13 cars, can be anything but contributory negligence under any circumstances. I do not care about the negligent construction of the track, because it seems to me he had no business to attempt such a risk."

Lehmann & Riggs and *Brennan, Donnelly & Van De Mark*, for appellant.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). Did the deceased assume the risk of the open drain? A drain or depression under switches is absolutely necessary. This is recognized in *Jarvis* v. *Railroad Co.*, 128 Mich. 61 (87 N. W. 136), and also *Franklin* v. *Railroad Co.*, 37 Minn. 409 (34 N. W. 898, 5 Am. St. Rep. 856). Its depth must depend upon circumstances. No complaint is made that the drain in this instance was deeper or wider than necessity required. Even on a main line, where the employé has full knowledge of the unsafe condition of the

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roadbed, it is held that he should refuse to work until the roadbed is made safe, and that, failing to do so, he is responsible for the consequences. *Little Rock, etc., R. Co.* v. *Leverett*, 48 Ark. 333 (3 S. W. 50, 3 Am. St. Rep. 230). A railroad company is not required to keep its side tracks absolutely even and smooth between the ties. They may be used without ballast, and the company will not be liable to an employé who falls in consequence thereof, if he was familiar with the condition, and made no objection. *Batterson* v. *Railway Co.*, 53 Mich. 125 (18 N. W. 584); *Ragon* v. *Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336). In *Batterson* v. *Railway Co.* it is said:

"It is matter of everyday experience that similar openings for ditches or other depressions are very common, and that it would not always be proper to close them."

This ditch or drain was known to exist by those living near by, who had nothing to do with the railroad. A hotel keeper living in the vicinity testified that the ditch had been there for years. The deceased passed over it every day. The crew to which he belonged stopped at this siding for dinner every day, and put in or took out cars four or five times a day. He had been in the employ of the company, at this place, for about a year. He must, therefore, have had knowledge of it, and voluntarily worked there without objection. If he considered it unsafe, he should have called the attention of his employer to its unsafe condition, and asked to have it covered. If it was unsafe, none knew it better than he and his fellow-servants, and no one ever made complaint during the many years it had existed, and there is no claim that any other accident ever occurred there. It must be held, therefore, that the condition of this side track was one of the risks assumed by deceased.

The case of *De Forest* v. *Jewett*, 88 N. Y. 264, is a case directly in point, and was cited with approval in *Ragon* v. *Railway Co.*, *supra*. In that case there were

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small, open ditches running across the track between the ties, which were in existence when the plaintiff entered the employment, and were well known to him. It was held that he assumed the risk.

Counsel for plaintiff rely upon *Plank* v. *Railroad Co.*, 60 N. Y. 607. That case is commented upon in *De Forest* v. *Jewett*, *supra*, and held not applicable to facts like those here existing. See, also, *Illinois Central R. Co.* v. *Neer*, 26 Ill. App. 356; *Wescott* v. *Railroad Co.*, 153 Mass. 460 (27 N. E. 10); *Michigan Cent. R. Co.* v. *Smithson*, 45 Mich. 212 (7 N. W. 791); *Swoboda* v. *Ward*, 40 Mich. 420; *Phelps* v. *Railway Co.*, 122 Mich. 171 (81 N. W. 101, 84 N. W. 66).

Judgment affirmed.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

SEMER v. AUDITOR GENERAL.

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1. TAXATION—DEED TO STATE—HOMESTEAD—RIGHTS OF ORIGINAL OWNER.

The original owner of land deeded to the State under the homestead provisions of the tax law cannot attack the title of a homesteader on the ground that the land was not barren, swamp, worthless, or abandoned, as set forth in the certificate of the examiner, which, prior to the amendment of 1899 (Act No. 107, § 127, Pub. Acts 1899), was a prerequisite to such conveyance.

2. SAME—STATUTE OF LIMITATIONS.

The provision of section 131, Act No. 107, Pub. Acts 1899, limiting the time within which suit might be brought to set aside the title of a homesteader under pre-existing provisions of the tax law to six months after said act became operative, was a valid enactment, and available, though the original sales to the State were jurisdictionally defective, and (CAR-

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PENTER, J., dissenting) though the homesteader had not obtained his deed, but had in fact abandoned the land.[1]

Appeal from Delta; Stone, J. Submitted November 21, 1902. (Docket No. 226.) Decided June 30, 1903.

Bill by John Semer against Perry F. Powers, auditor general, Edwin A. Wildey, commissioner of the State land office, and Tekla Engstrom Sundelius, to set aside a deed to the State of certain tax lands, and a homestead entry thereunder. From an order overruling a demurrer to the bill, defendants appeal. Reversed.

J. F. Carey, for complainant.

Horace M. Oren, Attorney General (*Charles W. McGill*, of counsel), for defendants.

HOOKER, C. J. John Semer, the owner of the original title to certain lands in Delta county, filed a bill setting forth the following facts:

First. His ownership.

Second. That the lands are heavily timbered and valuable, and have never been occupied except by one Engstrom.

Third. That the township board passed a resolution requesting the auditor general and commissioner of the State land office to cause examination to be made of all lands in the township which had been bid off to the State for more than three consecutive years for the purpose of homestead entry.

Fourth. That the auditor general pretends that such examination was made, and that a certificate has been filed that the lands described are barren, swamp, or worthless, and have been abandoned by their owner, and bid in by the State for more than three consecutive years.

Fifth. On March 31, 1897, the auditor general transferred the land to the State, professing to act in accordance with section 127 of Act No. 154, Pub. Acts 1895, and said deed has been recorded.

Sixth. The county treasurer has canceled all tax sales upon his records.

[1] See *Commissioner of State Land Office* v. *Auditor General*, 131 Mich. 147.

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Seventh. The auditor general caused a copy of the deed to be filed with the commissioner of the State land office, who now claims to hold the land subject to entry as homestead lands under section 131 of Act No. 206, Pub. Acts 1893.

Eighth. On August 3, 1897, Martin Engstrom, of Gladstone, made application to the commissioner to enter the land as a homestead, and received a certificate, under which he entered, and cut and removed valuable timber, cleared some land, and raised some crops, and moved upon the land, where he resided at intervals until the spring of 1899, when he abandoned the land. He died in February, 1900, and his widow subsequently married one Sundelius, and she now claims to be entitled to the possession of the land by virtue of said certificate, and to perfect her former husband's entry, and to receive a deed from the State on complying with the terms of the statute.

Ninth. That the proceedings are illegal and void because the examiner acted fraudulently, and reported this land as barren, swamp, or worthless, and abandoned by the owner, without an examination of the land; and that it is not barren, swamp, or worthless, but is valuable timber and agricultural land, and has never been abandoned.

Tenth. The bill sets up in detail the taxes charged against the land, constituting the alleged lien of the State.

Eleventh. It alleges that said taxes and the sales were illegal and void for various reasons stated.

Twelfth. It tenders payment of all such taxes, charges, etc., which may be found a lien.

Thirteenth. It alleges the unconstitutionality of section 127 of Act No. 154, and sections 128 to 134, inclusive, of Act No. 206.

Fourteenth. It alleges that the proceedings are a cloud on complainant's title.

Fifteenth. Prays taxes be set aside, deed declared void, homestead entry invalid, and statute unconstitutional.

The auditor general, commissioner of the State land office, and Mrs. Sundelius were made parties defendant, and all demurred. From an order overruling the demurrer, an appeal has been taken.

The statute upon which the defendants rely to support their demurrer is section 131 of Act No. 107 of the Public Acts of 1899. It contains a clause limiting the time within

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which actions can be brought by one claiming the original or government title to recover the possession of the lands, or to set aside the title of "such homesteader." This section is amendatory. The original section providing for such disposition of tax lands was passed in 1893. It was amended in 1895, 1897, and finally in 1899, when the limitation clause was first incorporated. It is contended that, under all of these acts prior to 1899, certain things were essential to the jurisdiction of the proper officer or officers, wanting which their acts were void, and their attempts to convey valid interests in the lands abortive. The deed to the State was made in March, 1897, and the homestead certificate was issued in August of the same year.

Counsel for complainant contends that the statute does not apply to the case, for three reasons:

1. The homesteader never acquired title.
2. He abandoned the homestead, and his family continued his abandonment after his death.
3. The lands were not taken in conformity to the law existing at the time, and the proceedings were void.

The conclusion reached by the learned circuit judge who heard the case was that the action of the auditor general could not have been had under the law of 1899 (because that law was not yet passed), and did not purport to be, and that the provisions of the prior law gave no power nor jurisdiction to take lands unless barren, swamp, or worthless, which the bill alleged this land not to be; and that, as the law of 1899 was the first to provide for joint action by the auditor general and commissioner of the State land office, and the bill was not filed to set aside any such joint action, the provision limiting the time to six months after the determination by such officers does not apply to this case, and that such provision should be applied only to transactions subsequent to its enactment.

The land in question was taken as a homestead under the law of 1895, which provides:

"SEC. 127. Whenever it shall hereafter appear that any lands delinquent for taxes have been bid off to the State

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for a consecutive period of more than three years, and that no application has been made to redeem or purchase the same, it shall be the duty of the auditor general and the commissioner of the State land office, when requested so to do by the township board of the township wherein such delinquent lands are situated, to cause an examination of such lands to be made as soon as practicable, to ascertain their value and the cause of the nonpayment of taxes thereon, and if it shall appear that said lands are barren, swamp, or worthless lands, and have been abandoned by the owner, upon a certificate being filed by the examiner to that effect, the auditor general is hereby authorized to make a transfer by deed of the same to the State, as to an individual, as provided in this act, which deed shall be recorded in the proper county, and a copy filed in the office of the commissioner of the State land office, and said commissioner shall thereafter hold said lands as State lands, subject to sale as hereinafter provided; and failure to pay the taxes or to redeem or purchase any lands sold for taxes and bid to the State for more than three consecutive years, as aforesaid, shall be, in all cases where such lands are not actually occupied, *prima facie* evidence that such lands are abandoned by the owner."

The bill shows that the lands were delinquent, and had been bid off to the State for eight or ten consecutive years, and it does not state that an application to redeem or purchase them has been made, and we understand that no question is raised over the fact that they are subject to examination under this statute. The bill also alleges that the request of the township board, requisite to set the auditor general and land commissioner in motion, was duly made. It states—impliedly at least—that an examiner was appointed, who made and filed the statutory report, but that said report misrepresented the land, which is valuable, and was fraudulently made by said examiner, without examination of the land. Upon these allegations it is contended that the auditor general and land commissioner acquired no jurisdiction to act, and make the determination which is a prerequisite to the transfer to the commissioner.

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We are of the opinion that this question is not open to this complainant. This land was *prima facie* the property of the State; and while, if its title was invalid, the true owner might controvert it, he was in no way concerned with what disposition the State should make of the land, if it was valid especially, as it could transfer no better title than it had. When the land was brought within the jurisdiction of these officers, and they acted, such action could not be overturned by a parol showing that it was not barren, swamp, worthless, or abandoned. There is a close analogy between this case and those which arose under the State swamp-land grants, where it was confided to the commissioner of the federal land office to designate the lands covered by the act. In those cases it was held that third persons could not question this selection, as was foreshadowed by the dissenting opinion of Mr. Justice Clifford in the case of *Railroad Co.* v. *Smith*, 9 Wall. 101, when he said:

"Special power is conferred upon the secretary of the interior to make out an accurate list and plats of the lands, and it is quite clear that a jury is no more competent to ascertain and determine whether a particular subdivision should be included or excluded from the list and plats required to be made under that section than they would be to make the list and plats during the trial of a case involving the question of title. Courts and juries are not empowered to make the required list and plats, nor can they determine what particular lands shall be included in the list and plats before they are prepared by the officer designated by law to perform that duty."

Johnson v. *Towsley*, 13 Wall. 72; *French* v. *Fyan*, 93 U. S. 172; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67 (5 Sup. Ct. 1157).

The defendants claim a title under a certificate from the State, and are in a position toward the State and the complainant analogous to that of the patentees from the government in the cases cited. While this question is not open to the complainant, its determination has no bearing upon the right of the complainant to attack the title con-

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veyed by the State by its certificate or deed, his right to attack which in the hands of the holder is the same as though it were still in the State, except as such right is affected by the statute of limitations.

The act of 1899 was the first of the series of laws passed upon this subject to impose a limitation upon actions to recover such lands, other than those prescribed by the general statute of limitations. It provides two. Section 127 provides:

"No suit shall be instituted to vacate, set aside, or annul the said determination of the said auditor general and the commissioner of the State land office, made as aforesaid, unless instituted within six months *after the determination aforesaid.* Any person desiring to file a bill or institute a suit to vacate the findings of the auditor general and commissioner of the State land office, as provided in this section, shall first pay to the auditor general all delinquent taxes," etc.

It is not improbable that this provision was designed to be prospective merely.

Section 131 contained another provision, reading as follows:

"*And provided further*, that any person who has purchased and entered into possession of any lands as a homestead under and by virtue of the provisions of this section as originally passed or as amended, when said lands had been bid off to the State and were held by the State for the taxes of one or more years, and said lands were delinquent for taxes for three or more years, shall, on performing the other conditions of said section as amended, receive a deed therefor as herein provided, and shall be deemed to have a good, sufficient, fee-simple title to said premises, to all intents and purposes, the same as though said lands had been bid off to the State for a consecutive period of more than three years, as originally provided in section 127 of said act. And in all cases where the lands have been taken as a homestead as set forth in last foregoing proviso, all actions of ejectment, or to recover possession of said lands, or to set aside the title of such homesteader, by any person, firm, or corporation claiming the original or government title, shall be commenced

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within six months after this act shall take effect, and not afterwards."

Before the demurrer can be sustained, we must find that the statute was retroactive. There is no trouble in this. It is expressly made so by its terms, and the legislature has authority to shorten the period within which an existing cause of action may be prosecuted, provided it give a reasonable opportunity. The following cases cited by counsel show this: *People* v. *Turner*, 117 N. Y. 227 (22 N. E. 1022, 15 Am. St. Rep. 498); *People* v. *Turner*, 145 N. Y. 451 (40 N. E. 400); *Turner* v. *New York*, 168 U. S. 90 (18 Sup. Ct. 38); *Saranac Land & Timber Co.* v. *Comptroller of New York*, 177 U. S. 318 (20 Sup. Ct. 642); *Terry* v. *Anderson*, 95 U. S. 628; *In re Brown*, 135 U. S. 701 (10 Sup. Ct. 972). Some of these cases have an application to complainant's third point, holding that a statute of limitation may be a valid defense against a title based upon proceedings void upon their face. See, also, Cooley, Const. Lim. (6th Ed.) 454; *Forster* v. *Forster*, 129 Mass. 559; *Cromwell* v. *MacLean*, 123 N. Y. 474 (25 N. E. 932); *Meigs* v. *Roberts*, 162 N. Y. 371 (56 N. E. 838, 76 Am. St. Rep. 322). The last case distinguishes the case of *Joslyn* v. *Rockwell*, 128 N. Y. 334 (28 N. E. 604).

This question is made plain by our own case of *Toll* v. *Wright*, 37 Mich. 93, where two statutes of limitation are discussed. One of these, enacted in 1863 (3 Comp. Laws, § 9714), was held not to bar an action where the adverse title was based on a sale (specified in the statute) if void upon its face. The other (being 2 How. Stat. §§ 6074, 6075; 3 Comp. Laws, §§ 9127, 9128) was a broader act, making no allusion to the action of a court, and it was held that the statute might be relied upon by one who held under any sale covered by the chapter mentioned. It was said that the construction contended for (which is the same relied on here) would defeat the statute entirely. The opinion continues:

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"What, then, is the meaning of the statute when it speaks of sales 'by an executor or administrator under the provisions of this chapter?' It certainly does not mean valid sales, for those need no protection. Neither can it mean sales lawfully ordered, for it makes no mention of any order, and speaks of sales only. Neither can it mean sales in which the statute has in all important particulars been followed, for the manifest purpose is to make an undisputed possession cure defects in the proceedings. Indeed, it cannot possibly, as we conceive, mean more than this: A sale purporting to be made under the provisions of the chapter, and in pursuance of an order professedly based upon them. If the administrator, with such an order, has made sale under the provisions of this chapter, and given a deed under which the necessary possession has been had, we think the case is fairly within the intent of the statute."

The statute before us is analogous to section 9127.

We cannot accede to the claim that the six-months limitation is confined to cases where the homesteader has obtained his deed, but think it covers any case where one claims under a valid homestead certificate. Nor do we think that the case is affected by the alleged abandonment of the homestead. It is for the State to enforce or waive the forfeiture, as it may see fit. *Larison* v. *Wilbur*, 1 N. Dak. 284 (47 N. W. 381); *Snow* v. *Flannery*, 10 Iowa, 318 (77 Am. Dec. 120); *Richards* v. *Snyder*, 11 Or. 501 (6 Pac. 186).

A decree will be entered sustaining the demurrer, with costs, and remanding the cause for further proceedings, the bill to be dismissed, with costs, upon application made after a failure to amend the bill within 20 days after the decree is entered in this court.

MOORE, GRANT, and MONTGOMERY, JJ., concurred with HOOKER, C. J.

CARPENTER, J. (*dissenting*). I do not think the limitation of six months prescribed by section 131, Act No. 107, Pub. Acts 1899, applies in a case—like that before us—where the homesteader has no deed from the State, and

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is not entitled to such a deed. Against the views urged in this opinion it is contended that this construction of the section makes the limitation clause entirely inoperative, as, at the time the law took effect, no homesteader was entitled to a deed. There is force in this argument, but not sufficient force to authorize us to give a construction to the law which, in my judgment, its language clearly forbids. I think it clear from its language that the legislature, believing there were cases "where the land had been taken as a homestead as set forth in the last foregoing proviso" (viz., cases in which homesteaders had obtained or were entitled to have their deeds), enacted the legislation in question, giving to such homesteaders, and to them only, the benefit of this extraordinarily short statute of limitations. If I am right in these views, and if there was no such case as supposed by the legislature, it is clear that its misapprehension does not give the court authority to apply the law to some other case. See *Woodward* v. *Watts*, 2 El. & Black. 452; *Reed's Appeal*, 114 Pa. St. 452 (6 Atl. 910).

I think the lower court was right in overruling the demurrer.

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DE CAIR *v.* MANISTEE & GRAND RAPIDS RAILROAD CO.

1. RAILROADS—INJURY TO BRAKEMAN—COUPLING MOVING CARS—EVIDENCE—CUSTOM.

In an action by a railroad brakeman for injuries sustained by being run over by a car while he was walking in front of the same in an endeavor to adjust a coupling, evidence that it was the custom of employés of defendant to go in front of moving cars, in coupling them, was admissible, though no rule on the subject had been promulgated, and there was therefore no occasion to prove a waiver. HOOKER, C. J., and GRANT, J., dissenting.

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2. SAME.

Where a brakeman, who was injured while passing in front of a moving car, alleged that he was in the performance of his duty as a brakeman, and was using due care, at the time, it was competent for him to testify as to his purpose in going in front of the car.

3. SAME—DEFECTIVE TRACK—NEGLIGENCE.

Evidence that a railroad company, after a washout in its yard, constructed a ditch across the main track, 18 inches wide and 12 inches deep, and allowed the same to remain for some time, filled with snow even with the ties, in consequence of which a brakeman was injured while making a coupling, is sufficient to justify a finding of negligence on the part of the company.

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a railroad brakeman, in accordance with a custom of employés of the company, went in front of a car moving at from 4 to 5 miles an hour, on the main track, for the purpose of adjusting a coupling, and was run over and injured in consequence of stepping in a ditch constructed across the track, which was filled with snow, and of the existence of which he had no knowledge, the question of his contributory negligence was for the jury. GRANT, J., dissenting.

Error to Manistee; McAlvay, J. Submitted April 11, 1902. (Docket No. 95.) Reargued January 14, 1903. (Docket No. 37.) Decided June 30, 1903.

Case by Frank De Cair against the Manistee & Grand Rapids Railroad Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Kellogg & Carbys (*F. W. Houghton*, of counsel), for appellant.

T. J. Ramsdell and *Charles A. Withey*, for appellee.

MONTGOMERY, J. The plaintiff was a brakeman on the defendant's road on the 1st of February, 1900. He left the service of defendant temporarily, and was away until the 9th. He returned and resumed work on Febru-

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ary 10th. In the meantime, and on February 7, 1900, there was a heavy rainfall, causing a washout in the yard of defendant company at Filer City. On the morning of February 8th, the superintendent of defendant company caused a ditch to be constructed across its main track, from the west side to the east side, about 18 inches wide and 12 inches deep. Some four days later the ditch was filled with snow, up even with the ties.

On the morning of February 26th, the plaintiff left Filer City, with his train and crew, and returned between 3 and 4 in the afternoon. He was acting as rear brakeman. The train consisted of the engine, two box cars, and about thirty flat cars loaded with logs, and, beyond this, a merchandise car and a passenger coach. As the train neared the south switch at Filer City, plaintiff uncoupled the two rear cars, and they were left about 150 feet south of the south switch. The other cars were pulled ahead, and made a flying switch for the logs; and the engine, with two Manistee & Grand Rapids box cars, loaded with wood, backed up towards the dock switch, which is about 600 feet north of the south switch.

After the plaintiff had uncoupled the two rear cars, he stepped off the merchandise car, and walked down the east side of the track, close to the rail, towards the dock switch. The bed of the track was covered with snow. He paid no particular attention to the roadbed between the rails. He went north on the east side for a distance of about 200 feet beyond the south switch. He then stepped across to the west side, because the bank was narrower on the east side. In the meantime the logs had been switched onto the dock tracks, and the engine, with the two cars loaded with wood, had backed up near the dock switch. The engine then started to back the two cars loaded with wood past the south switch, in order to couple onto the two cars left standing, and push them back south of the crossing, and clear the main track for Manistee. The plaintiff met the engine and the two box cars, backing slowly, a little south of the dock switch.

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He stepped on the ladder at the southwest corner of the car farther from the engine, and rode along upon the car. When the plaintiff met the cars, they were going at the rate of 6 or 8 miles an hour. When about 150 feet from the south switch, plaintiff gave the fireman a signal to back slowly, and, as they passed the south switch, the speed had been reduced so that they were then running about 4 or 5 miles an hour.

Just after they passed the south switch, plaintiff observed that the coupler on the car on which he was riding was closed, and needed adjustment. He had now passed onto the reverse curve, so that he could no longer see or signal the fireman. Plaintiff then stepped down from the ladder, and in front of the moving car, for the purpose of crossing over to the other side, where he could signal the engineer. The roadbed was free from obstruction, and apparently all right. In passing, he attempted to adjust the coupler, by opening it, so that it would couple onto the standing car left down by the crossing. He took hold of the coupling pin with his left hand, and the knuckle of the coupler with his right, and at the same time traveled towards the south, in front of the moving car; the track being apparently all right. He stepped into this ditch, fell down, and the car passed over and crushed his leg, just above the ankle. The circuit judge directed a verdict for the defendant, and the plaintiff brings error.

The plaintiff offered to show that it was the custom of employés of defendant company, in coupling cars, to go in front of moving cars. The court excluded this testimony. The testimony was admissible, under our former holdings. *Hunn* v. *Railroad Co.*, 78 Mich. 526 (44 N. W. 502, 7 L. R. A. 500); *Eastman* v. *Railway Co.*, 101 Mich. 597 (60 N. W. 309); *Fluhrer* v. *Railway Co.*, 121 Mich. 212 (80 N. W 23); *Jones* v. *Railroad Co.*, 127 Mich. 198 (86 N. W. 838).

We think it was also competent for the plaintiff to testify for what purpose he got down and started to pass through in front of the moving car. The declaration

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averred that he was in the performance of his duty as a brakeman, and was using due care and prudence. If the purpose in which he was engaged was one necessarily connected with the performance of his duty as a brakeman, it would tend to support this allegation.

That the testimony of the condition of this track was such as tended to show negligence on the part of the company is not open to doubt. *Ragon* v. *Railway Co.*, 91 Mich. 379 (51 N. W. 1004); *Palmer* v. *Railroad Co.*, 87 Mich. 281 (49 N. W. 613); *Sweet* v. *Railroad Co.*, 87 Mich. 559 (49 N. W. 882); *Anderson* v. *Railroad Co.*, 107 Mich. 591 (65 N. W. 585); *Hollenbeck* v. *Railway Co.*, 141 Mo. 97 (34 S. W. 494); *Chicago, etc., R. Co.* v. *Maroney*, 170 Ill. 520 (48 N. E. 953, 62 Am. St. Rep. 396); *Hannah* v. *Railroad Co.*, 154 Mass. 529 (28 N. E. 682).

The chief contention of defendant is that the plaintiff was guilty of contributory negligence, as matter of law, and the case of *Secord* v. *Railroad Co.*, 107 Mich. 540 (65 N. W. 550), is cited to sustain this contention. That case was determined upon the doctrine of assumed risk. The injury to the plaintiff resulted from his hand being pinched in coupling two cars, it being claimed that the couplings were defective. But it was said that the condition was as apparent to the plaintiff as to the defendant, and that he must be held to have assumed the risk. It was added that the condition of the drawbar was discovered when three car lengths from the place of coupling, and that plaintiff "testified that he could have raised the drawbar without taking hold of the link, thus avoiding any danger of his hand being pinched, and that he would not keep hold of the bar so long again in making such a coupling." We think the case is not controlling of the present. In the present case the testimony tended to show that the plaintiff was following a custom in passing in front of moving cars in the performance of his duty. This is not, as matter of law, contributory negligence. See *Ashman* v. *Railroad Co.*, 90 Mich. 576 (51 N. W. 645); *Eastman* v. *Railway Co.* and *Jones* v. *Railroad*

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Co., supra; and *Jarvis* v. *Railroad Co.*, 128 Mich. 61 (87 N. W. 136). It does not appear that the injury resulted from conditions known to the plaintiff to exist. On the contrary, it is at least open to an inference, to be drawn by the jury, that plaintiff could have completed all he started out to do, without injury to himself, but for the concealed defect in this track, not open to observation. We are not prepared to hold, as matter of law, that it was his duty to anticipate such an excavation in the main track of the defendant railroad.

The judgment will be reversed, and a new trial ordered.

MOORE and CARPENTER, JJ., concurred with MONTGOMERY, J.

HOOKER, C. J. I concur in the reversal of this case, upon the ground that plaintiff's negligence was not conclusively proved. In the absence of a rule, or, if there be a rule prohibiting employés from entering between moving cars to couple them or adjust couplers, if there be evidence showing its waiver, it is doubtful if the fact of such entry can be said to be negligence *per se*, under the circumstances of this case, where, although the estimated speed of the train was 4 miles an hour, or more, the plaintiff was able, after his fall directly in front of the car, to scramble upon his hands and feet, for a distance of 12 or 14 feet, and then get all of his person from the track but one foot. There is evidence indicating that it was good railroading to enter and adjust the coupler in the way attempted, and that it is necessary for both couplers to be open, when the cars are to be coupled on a sharp curve, and that opening them could not be done from the side of the car. While we know that there is always some risk in entering between moving cars, and can imagine cases where we will take judicial notice that it is so, we cannot make such a rule applicable to all cases of entering between moving cars to couple them or adjust couplers.

No rule forbidding the practice was proven in this case. Therefore proof of the custom upon this road was un-

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necessary to prove a waiver of a rule. It was competent to prove the general custom of well-conducted roads, to prove whether this act was negligent or not. But this does not warrant proof of the custom upon this or any other particular road, except as it may appear on cross-examination, and the court properly excluded such proof. The test is, What is the common or *generally* recognized method and practice? That is no more to be proved by the practice upon defendant's road than any other. To rest the case on the method followed by defendant's employés would practically be to make it liable for accidents resulting from whatever practice its employés should follow, whether it could be shown to be good railroading or not. Our attention is called to no Michigan case where such a practice has been followed. All, where proof of custom of the defendant road has been held proper, were cases where it was claimed that a rule had been violated by the plaintiff, and a waiver or abrogation of the rule was sought to be shown by the practice of the defendant's employés. That was true in the case of *Ashman* v. *Railroad Co.*, 90 Mich. 576 (51 N. W. 645), which might, at first blush, seem to justify the claim that such testimony is admissible when a rule is not relied on, but there is no such adjudication in that case. *Carrier* v. *Railway*, 61 Kan. 447 (59 Pac. 1075). It may be doubted if the rule as to waiver has not been carried beyond reasonable limits by some of the courts. See 3 Elliott, Railroads, § 1282; 19 Am. & Eng. Enc. Law, 822.

GRANT, J. (*dissenting*). I think the court properly directed a verdict for the defendant. The act of walking or running in front of a railroad train for the purpose of arranging or making a coupling has always been regarded as exceedingly dangerous. It requires no argument to show that it is so. In doing it, the brakeman is required to walk sidewise, with his eyes fixed upon the coupling apparatus, and not upon the track where he is walking or running. Railroad companies for many years experi-

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mented in the attempt to devise a coupling apparatus which would relieve brakemen from this dangerous work. It was at last accomplished by the device known as the "Automatic Coupler," wherein the coupling could be made by the brakeman outside the track. This device commended itself not only to railroad men, but to the people, through their legislatures. We find, therefore, that the Congress of the United States, in 1893, enacted that "on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Act March 2, 1893, chap. 196, 27 Stat. 531. The legislature of this State, as early as 1885, enacted a similar provision. 2 Comp. Laws, § 5511. This defendant company had complied with these provisions of the law, and had in use upon this train these devices, which obviated any necessity of going in front of the car to effect a coupling. The plaintiff himself testified: "The couplers were both in good condition, and in good working order." They were supplied with levers for raising the pins from the outside of the track.

The train was under the exclusive control of the plaintiff. If necessary to go in front of the car to arrange the coupling pin, he could have done it before he started the train. He could have stopped it, if necessary to do it. Instead of arranging the coupling pin in ways which were open to him and perfectly safe, he deliberately chose one full of danger. He entered upon the track at a place where neither the engineer nor the fireman could see him, without any notification to them of his intended conduct, upon a track covered with snow, when he was 164 feet from the car to which he was to make the coupling, and the train running, as he testified, at from 4 to 5 miles an hour. He describes his action as follows:

"I placed my left hand on the pin, and my right hand

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on the knuckle, in the act of opening it. I immediately started then to open the knuckle on this moving car. I did not attempt to get over on the other side of the track first, and give a signal to slacken up, but immediately started to open the coupler on this moving car."

If this is acting with due care and with proper regard not only for one's own safety, but for the benefit of his employer, I can hardly comprehend what negligence would be. There was no rule of the company requiring such risks on the part of its brakemen, and, if there had been, as we said in *Loranger* v. *Railway Co.*, 104 Mich. 80, 86 (62 N. W. 137), "such a requirement would be at once condemned as cruel and inhuman." No one is justified in taking such risks, unless absolute necessity demands it.

I think the court correctly excluded all evidence of custom on the part of the brakemen to go in front of moving trains to make couplings, on the ground that this was not a case for the application of the rule in regard to custom. Employés cannot create a custom, however universal, against their employer, by continually doing things in a reckless and negligent manner, when the employer has provided every means possible to do them with safety. I do not think such a doctrine finds approval in the decisions. There are cases holding that it is not negligence *per se* to go in front of a moving train to effect a coupling. But these are cases where there is also evidence tending to show that the work on the railroad could not be satisfactorily done otherwise. They do not apply to cases like the present one, where no possible excuse exists for doing the work in the manner this was done. We said in *Loranger* v. *Railway Co.*, *supra:*

"It is abhorrent to reason and common sense to say that it is good and safe railroading and careful conduct for a brakeman to step in front of a train moving as fast as a fast walk, and perform a service which requires him to step sideways to keep out of the way, knowing that death is almost sure to follow, should he miss his footing."

I think the judgment should be affirmed.

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BISARD *v.* SPARKS.

DEEDS—DELIVERY—RETENTION BY GRANTOR.

Where a deed executed to an infant was retained by the grantor in his own possession and control until his death, with the exception of a brief interval, when it was handed to the father of the infant to be read, he being instructed at the time to have it recorded if anything should happen to the grantor, there was no delivery, and the deed was inoperative.

Appeal from Newaygo; Palmer, J. Submitted April 9, 1903. (Docket No. 24.) Decided June 30, 1903.

Bill by Alice Bisard and others against George Sparks, Emma L. Sparks, Edith Sparks, and Lewis J. Crawford, guardian of Edith Sparks, an infant, to set aside a deed. From a decree for complainants, defendant Edith Sparks appeals. Affirmed.

George Luton and *S. D. Clay* (*Grove & McDonald*, of counsel), for complainants.

W. D. Fuller, for appellant.

MOORE, J. Complainants filed a bill to have a deed executed by their father, Barnid Clark, to the defendant Edith Sparks, declared void and canceled, as also a lease executed by the defendant Crawford, as general guardian of Edith Sparks, a minor, to her codefendants, George Sparks and Emma L. Sparks. From a decree finding that there was no consideration for said deed, and that it was never delivered to said Edith Sparks nor to any one in trust for her, and granting the relief prayed, the defendant Edith Sparks appealed.

The record discloses that George Sparks first became acquainted with Barnid Clark, August 15, 1900. Mr. Clark at that time was 74 years old. Six days later the following paper was drawn:

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"August 21st, 1900.

"I do hereby agree to let my farm to you on condition that you board me, do my washing and mending, and keep my horse, pay my taxes, keep the tools and fences in good repair. On these conditions you are to have all you raise and make therefrom as long as we do agree, or until I want to sell it, or when you go to leave the farm in the same condition as when you came, and the same amount of crops.

"BARNID CLARK.

"GEORGE SPARKS."

Under the above agreement George Sparks and Emma L. Sparks, his wife, taking with them their infant daughter, Edith, who was born June 6, 1900, immediately entered into possession of the farm, and Barnid Clark lived with them until the time of his death, which occurred August 21, 1901. June 26, 1901, Mr. Clark went before Mr. Brace, a conveyancer, and signed and acknowledged an instrument which had been prepared by Mr. Brace at the request of Mr. Clark, the material parts of which read as follows:

"This indenture, made this twenty-sixth day of June, in the year of our Lord one thousand nine hundred and one (1901), between Barnid Clark, of the township of Ashland, county of Newaygo, and State of Michigan, of the first part, and George Sparks and Emma Sparks (his wife), of the same place, of the second part: *Witnesseth*, that the said party of the first part, for and in consideration of certain services hereinafter mentioned to be performed by them to in hand, does by these presents grant, bargain, sell, remise, release, alien, and confirm unto Edith Sparks, daughter of the aforesaid George Sparks, her heirs and assigns, forever, all that certain piece or parcel of land. * * * The conditions of this deed referred to above are as follows: The aforesaid George Sparks and Emma Sparks (his wife) agree to support and properly care for the said Barnid Clark during his life, and to care for him and to defray the expenses of his last sickness, and after his death to defray all the expenses of his burial. And in consideration of the faithful performance of these conditions, he, the said Barnid Clark, agrees to deed as herein specified the above described premises to Edith Sparks, daughter of said George Sparks. Together with all and singular the hereditaments and appurtenances

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thereunto belonging or in any wise appertaining: To have and to hold the said premises, as herein described, with the appurtenances, unto the said Edith Sparks, and to her heirs and assigns, forever. And the said Barnid Clark, party of the first part, his heirs, executors, and his administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, her heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seised of the above granted premises in fee simple."

After Mr. Clark's death, this paper was taken by Mr. Sparks to a lawyer. Some doubt was entertained as to its effect, and an arrangement was made between the complainants, Mr. Sparks, and his wife by which the latter were to retain the crops and certain stock and the possession of the farm until November 25, 1901, and they in turn surrendered the paper before referred to. Later it was concluded that the rights of Edith Sparks under the paper could not be surrendered by her parents, and that the paper was a valid deed. A guardian was appointed for Edith, and the guardian executed upon her behalf a lease of the premises to her father, George Sparks. Soon thereafter this bill was filed. The case was heard in open court.

It is claimed by complainants that the instrument is not a deed, but an agreement to make a deed in the event that certain things were done, which never were done. It is also claimed that Mr. Clark was not competent to make the paper when it was made; that it was made without consideration, and that it was not delivered.

In our view of the record, the last-named question is the only one we need consider. In *Taft* v. *Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291), the court said:

"The authorities are all agreed that no deed can be valid without delivery by the grantor. It must be made operative by his act while he is able to act. There are cases where deeds and mortgages found to have been in custody of the grantor at his death have been held valid, but this has been done on proof, or facts amounting to proof, that he has made an effectual delivery, and become a mere custodian

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of the deed thereafter. In every case that we have discovered the question has been whether the deed had been delivered. No doubt, in some cases presumptions may have been stronger than in others, but the fact has been considered as absolutely essential, and, where the grantor has retained control of the title, it has been regarded as conclusive. One reason for this is found in the doctrine which, both under the statute of frauds and independent of it, is equally clear, that the purport of a deed cannot be changed by parol, and that no condition or reservation contrary to its terms is valid. A deed of conveyance in present terms is inconsistent with the retention of a life estate, and from the time when the deed is delivered as a conveyance the whole title goes with it, and it becomes irrevocable.

"Some difficulty was apparently raised about delivery where the grantee was ignorant of the transfer; but it has long been settled that a delivery to any third person, intended to make the conveyance operative, is a legal delivery. *Doe* v. *Knight*, 5 Barn. & C. 671; *Hosley* v. *Holmes*, 27 Mich. 416, and notes; *Souverbye* v. *Arden*, 1 Johns. Ch. 240. But a delivery to a third person, or even to the grantee, may be made for other purposes than to give the deed effect (*Johnson* v. *Baker*, 4 Barn. & Ald. 440); and the mere fact that it is put into their hands, if not as a completed transfer, will not bind the grantor. Thus, in *Jackson* v. *Phipps*, 12 Johns. 418, and in *Austin* v. *Register of Deeds*, 41 Mich. 723 (49 N. W. 923), the deposit of a deed with a public officer, but not for record, and with no purpose of giving the deed effect, was held no such delivery. In *Prutsman* v. *Baker*, 30 Wis. 644 (11 Am. Rep. 592), a deed in a third person's hands, subject to the grantor's orders, was held not delivered. And cases not unfrequently arise where a deed is handed to a grantee for inspection by himself or his counsel, or for some temporary purpose, where there is no completion of the transfer. *Johnson* v. *Baker*, *supra*; *Gilbert* v. *Insurance Co.*, 23 Wend. 43 (35 Am. Dec. 543).

"In *Jackson* v. *Dunlap*, 1 Johns. Cas. 114 (1 Am. Dec. 100), a deed duly executed, but retained by the grantor until the land should be paid for, and he dying before payment, was held inoperative. In *Stilwell* v. *Hubbard*, 20 Wend. 44, a deed made by the grantor, and retained by him with the distinct understanding that it would become operative at his death, and found among his papers with

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a will which it was designed to alter, was held void for want of delivery during life. In *Fisher* v. *Hall*, 41 N. Y. 416, it was held, after a careful discussion, that, where a deed was retained in the grantor's custody, there must be unequivocal proof of a legal delivery, intended to be operative. In *Wellborn* v. *Weaver*, 17 Ga. 267 (63 Am. Dec. 235), where a deed was intrusted to grantor's agent, to be delivered after death, it was also held that there could be no continuance of agency after death, and that there was no valid delivery."

See, also, *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264; *Schuffert* v. *Grote*, 88 Mich. 650 (50 N. W. 657, 26 Am. St. Rep. 316); *Chick* v. *Sisson*, 95 Mich. 412 (54 N. W. 895); *Burk* v. *Sproat*, 96 Mich. 404 (55 N. W. 985).

The necessity of delivery to give effect to a deed is not in doubt, and it becomes necessary to consider the testimony bearing upon that question. Mr. Brace testified, upon direct examination, that:

"I suggested to him that he leave it with the judge of probate, or some person, any one whom he thought best, to be given to Mr. Sparks after he was dead. He says, 'No, I am going to keep this deed myself until just before I die, and then I am going to give it to George Sparks myself.' I says, 'That is all right, but I would just make that as a suggestion.' 'Well,' he says, 'I am going to do it that way.' There was nothing more said about the disposition of the deed, and shortly after that he went away."

His cross-examination did not materially differ from this.

Mrs. Brace testified:

"*Q.* Just give your recollection of what he said.

"*A.* He says, 'Old Barnid knows what he is about, and he is going to keep the deed with him until just before he dies.'

"*Q.* Then what?

"*A.* 'Then I will give it to George Sparks.'"

Mr. George Sparks testified as follows:

"Clark had boarded with me up to the date of the deed. I had no knowledge of the making of the deed when it was made. * * * The house is a farm house, two

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stories high. In the lower part there is a kitchen, pantry, and bedroom off the kitchen, that Mr. Clark occupied. * * * I first learned of the deed August 13th. Until that time I never knew that he had made a deed. He never told me that he had done anything with his property; only I supposed he fixed his property, but he didn't mention it. I supposed he had done so, because he said he wanted to go down to fix his property. * * *

"*Q.* You may state how you came to learn about the deed.

"*A.* Well, I had been to work that day in my corn, and came up at night; got through hoeing and pulling weeds out of the corn. I came up, and I think I had been doing some chores, and I went in, and Mr. Clark sat in a rocking chair in the kitchen, and I says, 'Uncle Barney, I have my corn all cleaned out nice.' He says, 'I am glad of that.' 'But,' I says, 'I have a lame arm, the left arm.' He says, 'Go in my bedroom and put some liniment on.' I says, 'I guess I will;' and I rolled up my shirt sleeves and went into the bedroom, and took the liniment and put it on my arm. Mr. Clark got up and followed me in there, and he opened a little drawer in his bureau, and there was a pasteboard box set in there. He moved that to one side, and he says, 'Do you see that, George?' I says, 'Yes, sir.' He says, 'If anything happens to me—'

"*Q.* (interrupting) What was that?

"*A.* It was in an envelope; he didn't tell me; he says, 'If anything happens, you take care of that and get it recorded.' I says, 'What is it, Uncle Barney? Is it something for me?' I don't know whether he said 'No'; he said something, but I don't know what he said, but he said it was a warranty deed of this place to the baby. Then he says, 'Take it, and go and read it.' I took the envelope and went out, and I and the woman read it, and we carried it back.

"*Q.* Put it back in the envelope?

"*A.* Yes, sir.

"*Q.* When he made these statements he was in the bedroom?

"*A.* Yes, sir.

"*Q.* Was he standing up?

"*A.* Yes, sir.

"*Q.* Did he lie down on the bed?

"*A.* He laid down on the bed when I went out.

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"Q. Where was he when you came back?
"A. Laying on the bed.
"Q. Did he tell you to put it back in the bureau?
"A. No, sir; never told me any more than when I took it.
"Q. Where was the baby at that time?
"A. She was—
"Q. (interrupting) She was somewhere around the house?
"A. She was somewhere around the house; I don't know where.
"Q. Your wife was not in the bedroom when he made these statements?
"A. No, sir.
"Q. You read it with her?
"A. Yes, sir.
"Q. That would be eight days before he died. Did he grow worse after that?
"A. Yes, sir. * * *"

On the cross-examination he testified:

"Q. And the first you knew he had made any disposition or attempted disposition of his property was on the 13th day of August?
"A. Yes, sir; that is the first I knew.
"Q. What time in the day was it?
"A. It was between 4 and 6 o'clock, I should say.
"Q. The old gentleman was almost unable to talk then, wasn't he?
"A. No, sir.
"Q. Talked well, did he?
"A. Yes, sir.
"Q. Hadn't his daughters been there for several days before this?
"A. They had been there at times. He was so he was up and around.
"Q. You say he opened a drawer and you looked into it?
"A. He opened the drawer and moved this little box aside, and asked me if I saw that envelope.
"Q. What kind of an envelope was it?
"A. A large envelope.
"Q. Where is it now?
"A. I couldn't tell you.
"Q. What did you do with it?
"A. I delivered it to Mr. Wallace.

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"Q. On that day didn't you, that evening, put the envelope back in the drawer where you took it from?

"A. Yes, sir, after we read it.

"Q. How long did it take you to read it?

"A. It didn't take very long; I didn't keep track of the time.

"Q. His desire was that you and your wife should read it?

"A. Yes, sir.

"Q. And then return it—which you did—into the same envelope?

"A. He didn't say to return it; no, sir.

"Q. You did return it?

"A. I put it back.

"Q. Asked you to read it and return it?

"A. I put it back.

"Q. When did you next see it?

"A. I couldn't remember the date.

"Q. The day he died?

"A. No, I didn't see it the day he died.

"Q. The day after the funeral? You didn't see it again until after his death?

"A. I saw it the day after the funeral.

"Q. You didn't see it again until the day after his death?

"A. I think not.

"Q. Then did you go and take it out of the drawer unbeknown to any one excepting yourself and wife?

"A. Yes, sir.

"Q. What else did you take out of the drawer?

"A. Nothing.

"Q. How?

"A. Yes, I did.

"Q. What else did you take, after the funeral, that afternoon?

"A. After the funeral I had the money Mr. Clark turned over to me. * * *

"Q. What did you take out afterwards?

"A. Well, I took some money out the day he was buried, after we got back there. * * *

"Q. What did you do with the $80 you took out of the drawer.

"A. Turned it over to Mr. Clark's children.

"Q. Whereabouts did it lay with reference to the deed?

"A. The money was in this little box I spoke of, and on Friday— I will explain it if you wish [and he did so in

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detail]. Finally I says, 'Do you want me to take care of this for you?' and he says 'Yes.' I put it in my pocket, and from that time he never mentioned money to me. He said there was $60. When we counted it there was $80.

"Q. Who was present this Friday before he died, when he gave you this money?

"A. His son Morris was there, but I don't remember whether he was there at this time or not. * * *

"Q. Didn't you find some silver?

"A. Yes, sir.

"Q. Before he died?

"A. No, sir.

"Q. How much did you find?

"A. $4.75.

"Q. What did you do with that?

"A. Turned it over to Mrs. Bettis.

"Q. Together with the $80?

"A. Yes, sir; $84.75, I think. I have a receipt.

"Q. Did it lay loose?

"A. It was in his pocketbook.

"Q. That was how long before he died?

"A. It was after he was buried. * * *

"Q. You said something, in the last conversation you had with him— He couldn't talk very plain, I suppose, could he?

"A. Not at the time he gave me the money.

"Q. He said something to you, as I understand you, if anything happened to him he wanted that paper recorded?

"A. He told me if anything happened to him to take that, and take care of it, and have it recorded.

"Q. How long was that after you put it back there?

"A. It was before— I didn't understand the question.

"Q. How long after you and your wife read this instrument, and you put it back in the drawer, before he told you if anything happened to him that he told you you might have it recorded?

"A He told me before.

"Q. When you took it out to read?

"A. When I took it out to read he told me then to take care of it.

"Q. Then he told you if anything happened to him; he meant when he died?

"A. Yes, that is what I understood."

That is all the testimony tending to show a delivery. It will be remembered Mr. Clark was living in his own

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house, in which he had a bedroom occupied by himself. He declined to act upon the suggestion of the conveyancer to put the deed in the hands of a third person, but kept it in the drawer of his own bureau, in his own room. With the exception of the brief interval of time when it was in the possession of Mr. Sparks, to be read by himself and wife, it was in the possession and control of Mr. Clark from the time he signed it until after his death. He kept it where he kept a considerable portion of his money. Giving the testimony the most favorable construction possible for the defendant, we think it fails to show a delivery of the deed.

The decree is affirmed.

The other Justices concurred.

JOHNSON *v.* TOLEDO, SAGINAW & MUSKEGON RAILWAY CO.

1. CARRIERS—PERISHABLE SHIPMENTS—BILL OF LADING—THROUGH CONTRACT—ICED CARS—NEGLIGENCE.

Where a carrier gave a bill of lading for a car of perishable fruit consigned to a point in another State beyond its own line, specifying the route to destination, and reciting that the property was received subject to the carrier's liability under the common law and statutes in force in the various States through which the goods might pass, and that the car was to be iced at G., and re-iced as often as necessary, the carrier issuing such bill was liable for damage to the fruit caused by a failure to keep the car properly iced, whether the default was its own or that of a connecting carrier.

2. SAME—EVIDENCE—QUESTION FOR JURY.

Where, in an action against a carrier for injuries to fruit shipped under a contract requiring that the cars should be properly iced when delivered, there was some evidence that the cars furnished were inadequately iced, and that they were delayed in transit before delivery to a connecting

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carrier, whether the injury occurred while the cars were on defendant's line was a question for the jury.

3. SAME—SHIPPER'S KNOWLEDGE OF DEFAULT.

Where a bill of lading for the shipment of fruit provided that the cars should be iced at G., and re-iced as often as necessary thereafter, the fact that the shipper discovered that the cars were insufficiently iced before their departure did not impose a responsibility upon him or relieve the carrier, if the shipper had no opportunity to remedy the situation, and believed that the fruit would reach G. without injury.

Error to Kent; Perkins, J. Submitted February 4, 1903. (Docket No. 67.) Decided June 30, 1903.

Assumpsit by Charles A. Johnson and August A. Johnson, copartners as C. A. Johnson & Company, against the Toledo, Saginaw & Muskegon Railway Company, for the breach of a contract of carriage. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Reversed.

Burlingame, Belden & Orton, for appellants.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellee.

HOOKER, C. J. The plaintiffs have appealed from a verdict directed in favor of the defendant. They were copartners engaged in the business of buying and shipping fruit at Sparta. On September 25th the defendant sent to Sparta two refrigerator cars for their use, each car being furnished with 2,000 pounds of ice at Greenville, 26 miles distant. Plaintiffs began loading these cars the same afternoon, and finished the next morning by 9 o'clock. After the loading, and before the cars left Sparta, they accepted from the defendant's agent at Sparta the bills of lading which are claimed to constitute the contract between the parties. One of these cars was billed to Columbus, Ohio, the other to Indianapolis, Ind. When the cars reached their respective destinations, it was found that

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the fruit had become heated and injured, and this action was brought to recover damages resulting therefrom. The following is a copy of the bill of lading for one of the cars, and the other is similar, except as to destination:

"GRAND TRUNK RAILWAY SYSTEM.
"Bill of Lading.
"Chas. M. Hays, General Manager.

"SPARTA, MICH., Station, Sept. 26, 1900.

"Received from C. A. Johnson & Co., by the T., S. & M. Ry., in apparent good order (or as noted), the property described below (contents and value of package unknown), marked and consigned as per margin, and subject to carriers' liability under the common law and statutes in force in the various States, Territories, provinces, or foreign countries through which the goods may pass.

"This bill of lading to be presented by consignee without alteration or erasure. If the property is not removed by the consignee within twenty-four (24) hours after reaching destination, it will be retained in car or otherwise stored at owner's risk, subject to charge for use of said car or other storage; same, together with transportation charges, shall be a lien on the property.

"Any overcharge occurring on this bill of lading will be promptly adjusted.

"This bill of lading contracts rates from Sparta to Columbus, Ohio, via ——, at —— per ——, and charges advanced at $——.

Marks, Consignee, etc.	Articles.	Weight, Subject to Correction.
Sutton Bros., Columbus, Ohio. N. D. R. L. No. 7,544. Via Hocking Valley.	300 Bu. Peaches. O. R. Chgs. Gtd. S. L. & C.	15,000 pounds.

"Ice at Greenville, and re-ice as often as necessary to keep car thoroughly iced.

"R. D. BANCROFT, Agent."

The evidence shows that the cars left Sparta the day that the loading was finished, and within an hour thereafter, and at that time the plaintiffs claim to have been

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dissatisfied with the condition of the cars, and thought that the initial icing at Greenville had not been properly done. The cars arrived at Greenville somewhat late, owing to delays, and at half past 1 p. m. the defendant's employés commenced putting ice in them, and finished at 3:45 p. m. They put three tons of ice in each car. The cars arrived at Durand at 11:30 p. m., 72 miles from Greenville. Here they were separated. One proceeded at once over the Detroit, Grand Haven & Milwaukee division of the Grand Trunk Railway to Detroit, arriving there at 10 minutes past 7 a. m., and was delivered to the Lake Shore Company at 10 minutes past 10 a. m., of the 27th. Defendant's witnesses claim that the car was then found provided with sufficient ice. The car reached the Lake Shore icing station at Toledo at 2 a. m., September 28th, when 4,000 pounds of ice was supplied, and at 2:40 a. m. it left for Columbus, Ohio, over the Hocking Valley Road. The evidence indicated that there were two tons of ice in the car when it reached Toledo, according to plaintiffs' interpretation of it. The car reached Columbus before 3 a. m., September 29th. The ice boxes were then full of ice, but the temperature of the car is said to have been found high, and the peaches injured by overheating. The peaches were sold for $122.65 gross. They cost $295.

The other car left Durand on September 27th over the Grand Trunk Road, and reached Nichols, near Battle Creek, at 1:20 p. m. Plaintiffs say that defendant claims, but did not prove by competent testimony, that it was re-iced there. It left at 8:40 p. m., September 27th, and arrived at Grangers, Ind., about 1 o'clock a. m., September 28th. It was then transferred to the Big Four Road at a quarter of 7 a. m. of the 28th, the ice tanks being half full of ice. It left for Indianapolis, where it arrived early on September 29th. At 7 a. m. it was found to contain about 600 pounds of ice. The peaches were badly decayed, and the car was re-iced at once. The fruit was sold, and brought $94.70 gross, and the cost was $170.

It was admitted by defendant that the contract bound

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it to take these cars to Detroit and Grangers respectively. The plaintiffs claimed that defendant was liable for the loss, because (1) it was due to its negligence, the cars not being properly iced at Greenville before being sent to Sparta, and a delay occurring between Greenville and Grangers. (2) "If any part of the loss was due to the negligence of connecting roads, the defendant is liable therefor under the terms of the contract made, *i. e.*, the bills of lading used, and the attending circumstances."

We are of the opinion that the learned circuit judge was incorrect in saying that a through contract to transport to Columbus was not made by the defendant. If the provisions of the bill of lading ought not to be construed as showing such an intention, in view of the statement that the property was received "subject to carriers' liability under the common law and statutes," etc., we should not overlook the fact that it contained some other provisions giving rights to and imposing obligations upon both parties. Among these there are some which should be given little weight as evidence showing a through contract, though all may be consistent with such a contract. The provision regarding re-icing, however, is a significant one. There is nothing in the bill of lading, or proof, to show authority on the part of the agent or defendant company to bind connecting lines to "re-ice the car as often as necessary to keep the car thoroughly iced," yet it is evidently intended as a stipulation. It is contained in a receipt given to one shipping to a designated point by various lines stipulated. It is said that it only states a common-law liability of all roads. But does it not do more then state such a liability? The common law undoubtedly requires care in transporting perishable goods, and, under modern methods, we have no doubt that it would be held to extend to proper refrigeration, according to established custom. Was not the shipper given to understand that his car would at all times be kept thoroughly iced, whether essential to the preservation of the fruit or not, thus providing additional assurance of safety?

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If this was not the intention, the provision was superfluous. To whom did the plaintiffs have a right to look for the performance of this engagement? There is nothing on the face of the record to establish privity between plaintiffs and connecting lines as to this provision. There might be privity under another construction of this writing, but only to the extent of the ordinary obligations arising out of the reception of the car as a common carrier. This defendant, if any one, made this promise, and against it, only, could it be enforced according to its terms.

Again, the court held that there was no question for the jury as to injury while the cars were upon defendant's road. Some correspondence, to be found in the files, relating to a proposed amendment of the record, indicates a misunderstanding between court and counsel, which explains the action of the court in this regard. As finally settled, the record contains some evidence tending to show that the cars were inadequately iced when furnished, and that plaintiffs were not aware of the fact until they were loaded, and too late to remedy the difficulty. It also appeared that the cars were delayed from two to three hours on their trip to Greenville; also that there was a delay, at Nichols, of one of the cars.

We do not overlook defendant's contention that plaintiffs accepted the bill of lading and are precluded from questioning what occurred before, but we think that they were entitled to a properly iced car under that instrument. Moreover, we are of the opinion that the alleged discovery that the cars were warm and insufficiently iced, before their departure, did not impose upon plaintiffs the responsibility, and relieve defendant from its obligation, if they had no opportunity to relieve the situation, or honestly believed the fruit would reach Greenville without injury. These were all proper questions for the jury.

The judgment is reversed, and a new trial ordered.

CARPENTER, GRANT, and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

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KUEHNE *v.* UNION TRUST CO.

BANKS AND BANKING—LETTERS OF CREDIT—TRUST FUND—INSOLVENCY—PREFERENCES.

Money paid to a bank for a letter of credit issued by it for and in the name of another bank under the former's agreement of indemnity, the money being placed with the other funds of the bank, and, for convenience, entered on its books to the credit of the purchaser, but in such way as to prevent its withdrawal otherwise than by draft against the letter, does not constitute a trust fund for the benefit of the bank liable on and honoring the drafts drawn against such letter, so as to entitle it to preference over the general creditors of the other bank on the latter's insolvency.

Appeal from Wayne; Donovan, J. Submitted February 20, 1903. (Docket No. 148.) Decided June 30, 1903.

Petition by Percival Kuehne, Max Hessberg, Friederich Nachod, and Alphons Jacobson, copartners as Knauth, Nachod & Kuehne, against the Union Trust Company, receiver of the City Savings Bank of Detroit, for the allowance of a claim as preferred creditors. From a decree denying the petition, petitioners appeal. Affirmed.

Keena & Lightner, for petitioners.

Bowen, Douglas, Whiting & Murfin, for defendant.

HOOKER, C. J. The City Savings Bank of Detroit closed its doors on Monday, February 10, 1902, and was turned over to the banking commissioner on that day, and he is proceeding to close its affairs by proceedings in the circuit court for the county of Wayne. The petitioners are a firm of bankers doing business in New York, and their petition has been filed in the cause for the purpose of obtaining full payment of a check of $241.11 drawn on February 6, 1902, by the City Savings Bank upon the

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Western National Bank of New York, payable to the order of the petitioners.

One Milani, of Detroit, contemplated a trip to Europe, and had a conversation with the savings teller of the City Savings Bank, who advised him to take from said bank a letter of credit, and who explained to him the advantages of doing so, instead of carrying a large sum of money about his person. Milani subsequently brought to the bank a check upon it, drawn by his employer, for $500, and drew the money from another officer. He put $100 in his pocket, and paid $400 to the aforesaid teller, who issued to him a letter of credit for £80. Nothing further passed between them, but the teller entered the amount upon a savings passbook which he (the teller) kept, and put the same in the savings account kept by the bank. He entered Milani's name on a signature card, and wrote upon it, "Guaranty for a letter of credit." This was done to prevent any portion of said sum being drawn except as against the letter of credit, so that if a personal check of Milani had come to the bank, not drawn on that letter of credit, it would not have been honored. The withdrawals on the account were $173.19, leaving a balance of $226.81. The petitioners paid out drafts drawn on the letter of credit to the amount of £80, and have been paid only for three of Milani's drafts, aggregating $128.66. Two other drafts, aggregating $44.53, were drawn. The check of $241.11 was given to pay this item, and other items having nothing to do with Mr. Milani's account. The check was sent from Detroit February 6th, and should have reached plaintiffs Saturday, February 8th, and it would have been paid had it been presented on that day. The fund into which the $400 paid for the letter of credit by Milani went was not reduced below $1,000 at any time before the bank closed its doors. It is the petitioners' claim that the $400 paid by Milani for the letter of credit was paid and received by the bank for the specific purpose of meeting the obligation to petitioners under the letter of credit; that it was so treated by the

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bank; and, since the fund in which it was placed was never depleted below the amount of this trust fund, that petitioners are entitled to be paid in full. Upon the hearing the circuit court in chancery held otherwise, and denied the prayer of the petition.

We think petitioners' position untenable. Milani paid his money to the bank for an undertaking to pay him, through others, on demand, a lesser amount. This obligation was honored by other bankers, under some arrangement between the banks. This fund was never paid or received upon trust conditions, and there is nothing to justify giving them priority over other creditors. The entry and memorandum on the card was fully explained as precautionary merely, and not as giving Milani rights superior to those of any other depositor.

The decree is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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BARTLETT *v.* WAYNE CIRCUIT JUDGE.

PROBATE COURTS—APPEAL—BOND—APPROVAL—CONSTRUCTION OF STATUTE.

3 Comp. Laws, § 9386, provides that any executor, administrator, or creditor may appeal from the decision and report of the commissioners on claims in the probate court to the circuit court, if application for such appeal is filed in the probate office within 60 days from the return of the report. Section 9387 provides that, on appeal by a claimant, he shall, "within the time aforesaid, and before such appeal shall be allowed, give a bond to the adverse party, * * * to be approved by the judge of probate, and filed in his office." Section 9395 provides that, when an executor or administrator declines to appeal, any person interested in the estate as creditor, heir, etc., may do so, in the same manner as the

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executor or administrator might have done, providing that such appellant shall, "before the appeal shall be allowed, give a bond, to be approved by the judge of probate." *Held*, that, to perfect such an appeal by an heir, the appeal bond must be first approved by the judge of probate, and then filed within the time prescribed.

Mandamus by Frank W. Bartlett to compel Robert E. Frazer, circuit judge of Wayne county, to dismiss an appeal from commissioners on claims in probate court. Submitted March 30, 1903. (Calendar No. 19,763.) Writ granted June 30, 1903.

George W. Radford, for relator.

Leo M. Butzel and *Clyde I. Webster*, for respondent.

MONTGOMERY, J. This is an application for *mandamus* to require respondent to vacate an order refusing to dismiss an appeal from a determination of commissioners on claims in the probate court. The facts upon which the motion was based are these: The last day on which an appeal would be allowed by law to be taken was August 30, 1902. The administrator of the estate had not taken an appeal, and was on that day absent from the city. The heirs interested in the estate sought to take an appeal. The probate judge was also absent, and the circuit judge, Joseph W. Donovan, was communicated with, and stated that he would approve the bond on appeal and grant the appeal. This order was not, in fact, entered by him until September 2d, after the period for appeal had elapsed. Subsequently an *ex parte* application was made, and granted, for an extension of time for taking the appeal; but, as no attempt is made to sustain this *ex parte* action, no further reference will be made to that. The circuit judge refused to dismiss the appeal, on the ground that the action taken by Judge Donovan was valid.

The sections of the statute which must be construed are sections 9386, 9387, and 9395, 3 Comp. Laws. They are as follows:

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"SEC. 9386. Any executor, administrator, or creditor may appeal from the decision and report of the commissioners to the circuit court for the same county, if application for such appeal be made in writing, filed in the probate office within sixty days after the returning of the report of the commissioners.

"SEC. 9387. In case of an appeal by a claimant against the estate, he shall, within the time aforesaid, and before such appeal shall be allowed, give a bond to the adverse party, with sufficient surety, to be approved by the judge of probate, and filed in his office, with a condition that he shall prosecute his appeal to effect, and pay all damages and costs which may be awarded against him on such appeal."

"SEC. 9395. When an executor or administrator declines to appeal from the decision of the commissioners, any person interested in the estate as creditor, devisee, legatee, or heir, or any surety or sureties in the executor's or administrator's bond, may appeal from such decision in the same manner as the executor or administrator might have done, and the same proceedings shall be had, in the name of the executor or administrator: *Provided*, that the person appealing in such case shall, before the appeal shall be allowed, give a bond, to be approved by the judge of probate, as well to secure the estate from damages and costs, as to secure the intervening damages and costs to the adverse party."

It is claimed by respondent's counsel that, when the heirs at law filed a sufficient claim and bond on appeal, it then became the duty of the probate judge to act upon it, and that all that the appellant is required to do is to present the bond, properly executed, together with the claim of appeal, within the time fixed by the statute.

We think this contention cannot be allowed. The appeal is to be taken in the same manner as provided for the executor, and, under either section 9395 or 9387, the requirement is that the person appealing shall, before the appeal shall be allowed, give a bond, to be approved by the judge of probate; and we think a correct reading of the statute contemplates that this approval shall be had before the bond is filed. Similar statutes require an approval of the bond on appeal from justice's court, and,

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so far as we are advised, the practice has always been that these bonds have been approved before the time for appeal has elapsed.

We think the *mandamus* should issue.

HOOKER, C. J., MOORE and GRANT, JJ., concurred. CARPENTER, J., did not sit.

PEOPLE v. GRIFFITH.

BURGLARY—COMMON-LAW OFFENSE — ENTERING BARN—SPECIAL STATUTE.

One who breaks and enters the barn of another in the night-time, with intent to commit the crime of larceny, may be convicted of the burglary of such person's dwelling house,—both buildings being in the same inclosure,—notwithstanding Act No. 34, Pub. Acts 1899, prescribing a punishment for entering any barn or other outbuilding in the night-time, with intent to commit a felony or larceny.

Error to Van Buren; Carr, J. Submitted April 24, 1903. (Docket No. 173.) Decided June 30, 1903.

George Griffith was convicted of burglary, and sentenced to imprisonment for four years in the State house of correction and reformatory at Ionia. Affirmed.

O'Hara & O'Hara, for appellant.

Charles A. Blair, Attorney General, and *David Anderson*, Prosecuting Attorney, for the people.

MOORE, J. Respondent was convicted of the offense of burglary. He was sentenced for four years to prison. His counsel, in their brief, say:

"But one question is presented by this record, and that is this: Since the taking effect of Act No. 34, Pub. Acts

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1899, can one who is guilty of breaking and entering the barn of another in the night-time, intending to steal therein, be informed against and convicted, over objection, of burglary of that other's dwelling house?"

It is their claim "that the act of 1899 has restricted the common-law offense of burglary to the breaking and entering in the night-time of the actual dwelling house of another, with felonious intent," etc., and that the trial, conviction, and sentence of the respondent cannot be sustained.

The respondent was convicted under an information which charged him with having in the night-time of October 25, 1902, feloniously and burglariously broken and entered the dwelling house of one Warren, with intent to commit the crime of larceny therein. The testimony showed respondent broke into a barn at the time alleged in the information, and stole therefrom several bags of beans. This barn was within an inclosure which surrounded the dwelling house of Mr. Warren as well as his barn. The enactment of the law of 1899 did not do away with the common-law offense of burglary. The principles involved are fully discussed in *Harris* v. *People*, 44 Mich. 305 (6 N. W. 677), and *People* v. *Shaver*, 107 Mich. 562 (65 N. W. 538), and it is sufficient to refer to them.

The judgment is affirmed.

The other Justices concurred.

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CITY OF DETROIT *v.* DETROIT UNITED RAILWAY.

1. MUNICIPAL CORPORATIONS—STREET RAILWAYS—FRANCHISES—REPAIRING PAVEMENTS—DUTY OF CITY.

A provision in a franchise granted by a city to a street-railway company, that all repaving or repairing of pavements on streets used by the company shall be done at the expense of the city, without any charge whatever against the company,

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makes it the duty of the city to repair the foundation necessary for the support of the company's tracks.

2. SAME—VALIDITY OF CONTRACT—INTERNAL IMPROVEMENTS.
It is no objection to the validity of such provision that such foundation must be heavier than that required by the ordinary traffic on the streets; nor can it be said that the city thereby engages in a work of internal improvement.

Certiorari to Wayne; Brooke, J. Submitted April 7, 1903. (Calendar No. 19,867.) Decided June 30, 1903.

Mandamus by the city of Detroit to compel the Detroit United Railway to make certain repairs on a street. From an order granting the writ, respondent brings *certiorari*. Reversed.

Timothy E. Tarsney, for relator.

Corliss, Andrus, Leete & Joslyn (*C. D. Joslyn*, of counsel), for respondent.

HOOKER, C. J. We are asked, upon behalf of the respondent, to review the allowance of a writ of *mandamus* requiring the respondent, a street-railway company, to make certain repairs on Bagg street in the city of Detroit, the cause being before us upon *certiorari* to the circuit court for the county of Wayne. The respondent succeeded to certain franchises received by its assignor by virtue of chapter 95 of Howell's Statutes, and the consent of the relator, whereby, in consideration of respondent's consent to a low fare, the relator agreed that:

"All paving or repaving or repairing of pavement upon any of the streets upon which said grantees * * * shall hereafter construct, maintain, and operate a street railway shall be done wholly at the expense of the city of Detroit, both within and without the rails of said tracks, and, after being paved or repaved by the city, the same shall be maintained and kept in repair by said city of Detroit, and there shall be no charge whatever, in any form or manner, against said grantees * * * for said repaving and repairing of said streets and pavements."

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But it was also provided that:

"This section shall not be construed as relieving the grantees, their successors or assigns, from paving, in accordance with the general street-railway ordinance, at their sole expense, under the supervision of the board of public works, all tracks and the spaces between the double tracks put by or for them into streets already paved at the time of first construction of said tracks in such paved streets; but such work shall be done by the grantees, their successors or assigns, at their sole expense, under the supervision of the board of public works, said supervision to also be at the expense of the grantees, their successors or assigns, who shall restore the street to a condition satisfactory to said board of public works; and thereafter the care of such pavement shall be at the expense of the city, as heretofore provided in this section.

"In all unpaved streets wherein the grantees are duly authorized by the common council to construct street-railway tracks under the provisions of this ordinance, the preparation of the roadbed shall be made by the grantees, their successors or assigns, the excavation to extend seven inches below the under side of the cross-ties upon which the tracks are laid; but the six inches of concrete required by the ordinance as foundation for the ties to rest upon shall be laid by and at the expense of the city at the time of the construction of the tracks; the city not being required, however, to do the paving between the tracks until the street is paved. The common council may, however, in its discretion, order the paving of the tracks on unpaved streets to be done at city expense contemporaneously with the first construction of said tracks."

Bagg street had been paved before the respondent constructed its railway upon it. According to the ordinance, it constructed the foundation and laid its track, as required by the city, under the supervision and to the satisfaction of its officers. Subsequently, some spots adjacent to its tracks became in bad condition, the pavement disintegrated and destroyed, and the foundation under the rails in places settled, allowing the rails to settle, due to the use of the track. The railway company having refused to repair the foundation and pavement, this proceeding was instituted. The questions discussed are:

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"*First.* Whether a fair construction of the language of the ordinance, with reference to the maintaining and repairing of all the pavement and foundation, can fairly be made to cover the foundation necessary for the support of the track of the respondent company.

"*Second.* If it can, was the condition *ultra vires?*

"*Third.* Is *mandamus* a proper remedy?"

We think but one answer can reasonably be given to the first question, viz., that the city, and not the respondent, should do this work. Counsel invokes the principles enunciated in *People* v. *Township Board of Salem*, 20 Mich. 452 (4 Am. Rep. 400), and *Attorney General* v. *Pingree*, 120 Mich. 550 (79 N. W. 814, 46 L. R. A. 407), viz., that "it is unlawful to impose a tax to aid a private enterprise," and that "the city cannot engage in a work of internal improvement." There is no uncertainty in the contract, as shown by the words:

"There shall be no charge whatever, in any form or manner, against said grantees, their associates, successors, and assigns, for said repaving and repairing of said streets and pavements."

It is claimed, however, that the city had not the authority to bind itself by such a contract, for the reason that the construction and use of a street railway requires a heavier and stronger foundation than is required in the other portions of the highway used by lighter vehicles. A street railway is a public utility; it is an appropriate and necessary method of using the highway; and the municipalities may permit them to occupy and use portions of the streets. Such occupancy is in common with that of the general public, all persons being at liberty to drive upon and over them where they are laid in the traveled portion of the street. The street-railway law does not in any way relieve the municipalities from the responsibility of maintaining the highways in a reasonably safe condition for public travel, and, as it cannot shift its liability to a railway company by contracting with it for the maintenance of the way, it would seem that it should be author-

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ized, if it is not under a legal obligation, to repair the way when out of repair, whatever the cause. The right to assess the cost of pavement upon adjacent landowners is settled, and a wide discretion as to kind, solidity, and cost is left to the authorities. There can be no doubt that they may specify such a pavement as the present or prospective traffic of the street may require, and provide varying foundations according to circumstances. In all ordinary cases the same are made adequate to sustain the vehicles that will traverse the streets. If street cars could be run without a fixed way of special construction, so that they could run upon any portion of the highway, the foundations of the entire roadway would need to be heavier and stronger, and in such case there would be no impediment to the construction of the same in the ordinary routine of building and repairing highways, unless it be the fact that the running of such cars might be a monopoly. Street railways are adapted to aid travel in the public highways, and, while the laws providing for their use impose upon private corporations the burden of constructing and operating them, all such laws contemplate that they will be constructed upon the highway. They presuppose a highway maintained by the public, and we are of the opinion that it is not beyond the authority of the public officers to build a highway that will support such traffic, even though it need a heavier pavement than ordinary traffic requires. We are also of the opinion that it cannot be said that the city engages in a work of internal improvement by making a contract whereby it shall construct and repair its highways and pavements, instead of allowing the railway company to interfere with them.

The order is reversed, and the writ denied.

CARPENTER, GRANT, and MONTGOMERY, JJ., concurred with HOOKER, C. J. MOORE, J., concurred in the result.

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HEFFRON v. DALY.

1. LIFE INSURANCE—ANTI-REBATE LAW—PREMIUM NOTE—VALIDITY—CONSIDERATION.
   2 Comp. Laws, § 7219, makes it a misdemeanor for a life-insurance agent to pay or allow any rebate of premium as an inducement to insurance. In an action by such agent on a premium note, the amount of which he had paid to the company, it appeared that he had induced defendant to take the insurance by giving him the benefit of the agent's commission of one-half the premium, taking the note in suit for the balance. *Held*, that the note was void for want of consideration, by reason of the illegality of the insurance contract.

2. SAME—ILLEGAL CONTRACT—PLEADING.
   The illegality of a contract of life insurance, because made in violation of the anti-rebate law, need not be pleaded in defense of an action on a premium note, as it is the duty of the court to take notice of the illegality *sua sponte*.

Error to Wayne; Frazer, J. Submitted April 9, 1903. (Docket No. 10.) Decided June 30, 1903.

Assumpsit by John Heffron against William M. Daly upon a promissory note. From a judgment for plaintiff, defendant brings error. Reversed.

W. W. Wicker, for appellant.

Hayes & Lawson, for appellee.

HOOKER, C. J. This plaintiff's action is based upon a promissory note for $139, dated September 8, 1896, payable to the plaintiff, or order, on or before January 1, 1897. His proof shows that the note was given in payment of the first premium upon a policy of insurance, which policy was afterwards delivered to the defendant by the plaintiff, who was agent for the company issuing it, to which company the amount of the note was paid by the plaintiff as its share of the premium.

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By way of defense, the defendant insists that he received no consideration for the note, which he said was given "for the accommodation of the plaintiff, upon the understanding that he was not to be called upon to pay it if the policy was not all right." He says the policy was not "all right" for the following reasons:

1. Defendant's application for a policy was solicited, and, as an inducement for him to take it, plaintiff offered to give him the benefit of the agent's commission, viz., one-half of the premium, and take defendant's note for the remainder, *i. e.*, $139, and that this reduction of the first premium was a violation of Act No. 171 of the Public Acts of 1889, being 2 Comp. Laws, § 7219, and rendered the policy illegal and void.

2. Defendant's policy never was in force, for the reason that it contains a provision that payment of premium to any person, except in exchange for the official receipt of the company, will not be recognized by the company or deemed a valid payment; and the application provides that "any policy issued upon this application shall not go into effect until the first premium has actually been paid in cash during the lifetime and good health of the applicant." No such receipt was given to the defendant, nor has he ever paid the first premium in cash, though the evidence shows that the company received said premium, less the agent's commission, from the plaintiff, and issued the policy.

3. Defendant contends that the policy is void for the further reason that his age is stated as 55 years in his application, when he was in fact 58 years of age, and so informed the agent. He says he called plaintiff's attention to it when he delivered the policy, and told him that "he did not think the policy was any good because of the age." Plaintiff denied this testimony, and testified that the defendant did not inform him that he was born in 1838; also that the policy was a receipt for the first premium.

It appeared upon the trial that the insurance company went out of business in 1900, and that its affairs are being closed by a trust company.

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The learned circuit judge submitted one question to the jury, viz.: Whether the plaintiff was a party to the alleged misrepresentation of defendant's age. He instructed them that the note was not void by reason of the violation of the statute. 2 Comp. Laws, § 7219. In this we think he erred. The contract of insurance was prohibited by law, and the act of making it was a penal act. The contract was therefore illegal, and, being so, the consideration for the note failed. *State Life-Ins. Co.* v. *Strong*, 127 Mich. 346 (86 N. W. 825); *Citizens' Life-Ins. Co.* v. *Commissioner of Insurance*, 128 Mich. 85 (87 N. W. 126). It is said that the point should have been pleaded. If there would otherwise be force in this point, it is avoided by the rule that it is the duty of the court, *sua sponte*, to take notice of illegality. *Richardson* v. *Buhl*, 77 Mich. 632 (43 N. W. 1102, 6 L. R. A. 457); *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

The judgment is reversed, with costs of both courts, and there is no occasion for a new trial.

MOORE, GRANT, and MONTGOMERY, JJ., concurred. CARPENTER, J., took no part in the decision.

HODGSON v. FISHER.

DEEDS—DESCRIPTION OF LAND—APPEAL—EVIDENCE.

On a review of the evidence, the conclusion of the circuit judge as to the location of certain lands conveyed was sustained.

Appeal from St. Clair; Law, J. Submitted April 23, 1903. (Docket No. 46.) Decided June 30, 1903.

Bill by William F. Hodgson against Alexander T. Fisher, impleaded with William Fisher, Jr., to quiet title. From a decree for complainant, defendant appeals. Affirmed.

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Avery Bros. & Walsh, for complainant.

William D. Fox (*Atkinson & Atkinson*, of counsel), for defendant.

MOORE, J. This case is an appeal by the defendant from a decree rendered in favor of the complainant. The bill is filed by complainant to remove a cloud from the title to a piece of land situated in the township of Clay, in St. Clair county. Defendant Alexander T. Fisher answered, claiming title to the land described in the bill of complaint. Defendant William Fisher, Jr., filed a disclaimer.

Both parties agree that on March 1, 1873, the title to said lands was in one Thomas Fish. On that day Thomas Fish and wife made, executed, and delivered a warranty deed to one William Q. Fish, which deed contained the following description:

"One acre of land, to be laid off in square form from the northeast corner of the farm of the said Thomas Fish, in lot No. 2 of Harsen's Island, township of Clay, St. Clair county, State of Michigan."

The defendant claimed this deed did not convey the title to the land described in the bill of complaint.

The circuit judge found that a fair construction of this deed, from the description therein contained, locates this acre in the most northerly part of the Thomas Fish farm, next to the river St. Clair, and that the testimony shows the parties to this instrument gave this construction to this description by actually locating the acre in said place, as the grantee went into possession of an acre in that location, which acre extended to the river St. Clair. He also found that the grantee in said deed from Thomas Fish and wife, dated the 1st day of March, 1873, and all subsequent grantees in the chain of title, including tenants and contract purchasers under any of these grantees down to the complainant, have occupied to the river on this land, excepting the public have been permitted to use a strip of

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land next to the river and off from the river front as a highway, and that the possession of the land described in the bill of complaint is, and has been since the year 1873, in the complainant or his grantors in the chain of title. The important question in the case is one of fact, and we think the conclusion reached by the circuit judge is fully sustained by the evidence.

The decree is affirmed.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

BROWNSON v. ROY.

SAME v. MARTIN.

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1. LANDLORD AND TENANT—ASSIGNMENT OF RENTS—RECEIVERS—CONFLICTING RIGHTS.

Where rents yet to accrue are assigned to secure the payment of a claim, a subsequent conveyance of the premises, under the order of the court, to a receiver, does not destroy the right created by the assignment, so as to entitle the receiver to the rents as against the assignee.

2. SAME.

Rents not yet due may be assigned without transferring to the assignee the title to the premises, and the assignee, after notice to the tenants, may collect the rent as it becomes due.

3. SAME.

An assignment of future rent is not ineffectual because made after the expiration of the occupant's lease, where the parties have continued the existence of the tenancy, and treated the assignment as operative.

4. SAME—BONA FIDE PURCHASERS.

A receiver of property, having a conveyance under order of court, cannot claim the rents thereafter accruing, as against an assignee thereof who has given notice to the tenants, on the ground that he had no notice of the assignment.

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Error to Wayne; Carpenter, J. Submitted April 10, 1903. (Docket No. 29.) Decided June 30, 1903.

Assumpsit by Robert M. Brownson, receiver of Herman A. Strassburg, against Helen Roy, and also against Lucy J. Martin, for rent. From judgments for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

McBryan & Brownson (*Henry B. Graves*, of counsel), for appellant.

Edwin Henderson, for appellees.

MOORE, J. These cases were commenced in justice's court. They were appealed to the circuit court. The judge directed a verdict for the defendants. The plaintiff has brought them here by writ of error.

The trial judge, in directing a verdict, stated the questions involved as follows:

"The plaintiff is the receiver of Herman A. Strassburg. These are suits for rent. The facts are as follows:

"In September, 1901, the plaintiff called on each of the defendants, who were occupying as tenants under a lease from Herman A. Strassburg, and notified each of them that he was the receiver appointed by the court, and demanded of them the rent for the premises which they were occupying. Each paid him the month's rent then due (being for the month of August, just passed), and promised to pay him the rent thereafter accruing. Inasmuch as the title of Mr. Strassburg was determined by foreclosure proceedings which ended that title on the 1st of November, the rent involved in this suit is the rent for the months of September and October.

"The defense interposed is that Herman A. Strassburg, on the 26th day of October, 1899, assigned the rent in question to his mother by written assignment, which assignment is in evidence, and immediately thereafter the defendants in these cases, who were then tenants, were notified of the assignment. Thereafter the rent was collected by said Herman A. Strassburg, as agent of his mother, and turned over to her. The rents for Septem-

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ber and October, 1901, involved in this suit, were likewise collected by said Herman A. Strassburg, as agent for his mother, and turned over to her. The explanation of the defendants as to their promise to pay the plaintiff is that they supposed that this meant the right of Mrs. Strassburg to collect the rent had also been terminated. * * *

"It is contended by the plaintiff that the assignment of rents being unlimited in time, and there being no outside oral agreement changing its effect, it was effective only so long as the relation of landlord and tenant actually existed; that the conveyance by Herman A. Strassburg to the receiver, under the order of the court, and the subsequent agreement to attorn to Mr. Brownson, the plaintiff, created the relation of landlord and tenant between the plaintiff and defendants, and terminated the relation of landlord and tenant between Strassburg and the defendants; that this rendered the assignment in question thereafter altogether ineffectual; and that it has no force against the right asserted by the plaintiff in this case. I am bound to say that this argument is one that deserved most serious attention, and I am not sure but what it is sound. It does not, however, seem to me that, looking at the purpose which this assignment was intended to serve (*i. e.*, to secure to Mrs. Strassburg, the mother of Herman A., something to be applied on the payment of her claim),—that it is difficult to recognize the right as existing on the part of her son, by voluntary conveyance by himself (and this certainly can never have greater force than a voluntary conveyance), to terminate that right. He has assigned rent to secure her rights. Is it consistent with that assignment that he can, by voluntary act of his, without her consent, put an end to it, and altogether destroy that right created by the assignment? It seems to me not.

"It is insisted, also, on the part of the plaintiff, that, as I understand the contention, rent cannot be assigned separate and apart from the title. In other words, that rent not yet due cannot be assigned without transferring to the assignee some title in the property, by which the assignee himself can enforce the collection of the rent.

"In the case of *Kane* v. *Clough*, 36 Mich. 436 (24 Am. Rep. 599),—a decision rendered by Judge COOLEY, and concurred in by his associates, Justices GRAVES, CAMPBELL, and MARSTON,—it was decided that where one was working for another, doing piecework, but without any definite contract for the continuance of his employ-

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ment, he could assign the wages to become due, and that that assignment would be effectual against a subsequent garnishment. Judge COOLEY, in the course of his opinion, says:

"'An officer may assign his salary, though removable at any time. *Brackett* v. *Blake*, 7 Metc. (Mass.) 335 (41 Am. Dec. 442). In Pennsylvania an assignment which professes to transfer a debt to arise for wages not yet earned, against any one by whom the assignor may thereafter be employed, is held to be ineffectual, even after the wages are earned. *Jermyn* v. *Moffitt*, 75 Pa. St. 399. In New Hampshire it is decided that wages to become due may be effectually assigned, provided there is at the time an existing contract under which they are to be earned. *Garland* v. *Harrington*, 51 N. H. 409. The like conclusion is reached in Connecticut. *Hawley* v. *Bristol*, 39 Conn. 26; *Augur* v. *Packing Co.*, Id. 536. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment, and those in which they are, is said to be that "in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right." *Low* v. *Pew*, 108 Mass. 347, 350 (11 Am. Rep. 357). But an assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence.'

"In the case of *Preston Nat. Bank* v. *George T. Smith Middlings Purifier Co.*, 84 Mich. 364 (47 N. W. 502), an assignment of valid outstanding accounts was held effectual by the Supreme Court.

"In my judgment, these cases go quite as far as the defendants' contention requires. I think there are ways in which the assignee in such a case can enforce his claim, not, perhaps, by summary proceedings, inasmuch as he has not the title; but it seems to me there would be no difficulty whatever in his maintaining an action, even at law, to recover rent after it is earned, against the tenants. The assignment having been made, and the tenants having notice of it, the rent, after it becomes due, can be collected, it seems to me, by the assignee. The fact that every right that the landlord might have to collect it is not open does not impair the effect of the assignment.

"The plaintiff also urges that the assignment is ineffectual because, by its terms, when carefully considered, it

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does not apply to the rent in question here. This assignment was made more than a year before the rent in question became due, and the written lease, which was at that time in existence, had, in accordance with its terms, expired. * * * The evidence shows that the parties actually continued their relations under this lease; they were practically tenants holding over; and, as claimed by the plaintiff, I think it is probable that the relation existing between them was that growing out of a tenancy from month to month. It is a rule of law, and applicable to documents of this informal character, that the construction which the parties themselves actually put upon them by their conduct will have great weight in determining their meaning. Inasmuch as all the parties immediately concerned in this assignment (*i. e.*, Mr. Strassburg, his mother, and the tenants) construed this and treated this assignment as operative, I do not think that the plaintiff in this case can insist upon its receiving a different construction, unless his point that he took his title without notice can be sustained.

"It is insisted by the plaintiff that inasmuch as he obtained a deed of this property from Mr. Strassburg, executed under the order of the court, containing no reservations which affected these leases in question, and having no actual notice (and I am bound to say he had no actual notice), whatever rights Mrs. Strassburg may have had, they do not in any way impair the validity of his title. It is to be borne in mind, in considering this question, that an examination of the writings in the office of the register of deeds would have disclosed no transfer of title to Mrs. Strassburg. My attention is called by plaintiff's counsel to the case of *Steel* v. *De May*, 102 Mich. 274 (60 N. W. 684). In that case, after certain leases had been executed, they were assigned to the complainant, Robert M. Steel, as security. Without notice of this assignment, either actual or constructive,—no record thereof being made in the register's office,—the defendant acquired title to the property. It is held by the Supreme Court, under these circumstances, that the defendant's title was in no way affected by the assignment of the leases to the complainant. The court say:

"'We think that, while such possession of the lessees would be notice of their rights, it would not be notice that the title of De May had been incumbered by the assignment of the leases reserving rent to himself.'

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"It will be noticed that in that case the tenants presumably had no notice of this assignment; at least, the rent was still payable to, and doubtless received by, their former landlord. In this case Mrs. Strassburg has done all that she could do to give notice of her rights, by notifying the tenants, and by collecting the rent in the manner it was collected. This case, too, differed from that in this important particular: In that case complainant's rights, whatever they may have been, were most clearly an interest in land. There he had an assignment of the leases, which were kept off the record. Here is an assignment of rent, which I do not think, strictly speaking, is an interest in land. While I must confess to much doubt upon this question, I am inclined to the opinion that Mrs. Strassburg having done all she could do; having notified these tenants that thereafter the rent must be paid to her; they having treated this notice as valid,—I am inclined to think that the law will sustain her rights. The plaintiff in this case, being the receiver appointed by the court, having only the title which was given him by deed executed under the court's order, can only claim such rights in this property as Mr. Strassburg himself could have enforced."

After giving full consideration to the briefs of counsel, we are satisfied the trial judge made a proper disposition of the case. We deem it unnecessary to add to what was said by him, further than to cite two cases which we deem in point: *Perrin* v. *Lepper*, 34 Mich. 292; *Kelly* v. *Bowerman*, 113 Mich. 449 (71 N. W. 836).

Judgment is affirmed.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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GEORGE COLLIN CO. v. McLEOD.

ACCOUNTING—APPEAL—EVIDENCE.

A decree on an accounting was affirmed, under the evidence.

Appeal from Montcalm; Davis, J. Submitted April 8, 1903. (Docket No. 4.) Decided June 30, 1903.

Bill by the George Collin Company against Dan McLeod, Jay C. Newbrough, Vernon H. Smith, and Hal H. Smith to enjoin a suit at law and for an accounting. From a decree dismissing the bill, complainant appeals. Affirmed.

N. O. Griswold, for complainant.

V. H. & H. H. Smith, for defendants.

HOOKER, C. J. The complainant is a corporation, and its principal place of business has been at Greenville. For several years it carried on a lumbering business at Martiny, in Mecosta county; defendant McLeod having general superintendence. The business included a store. Defendant Newbrough was complainant's bookkeeper at Greenville at one time, while defendants Smith are McLeod's counsel. Complainant's business operations were suspended at Martiny in 1895 or 1896; defendant McLeod being left in charge. He claimed a balance of about $1,500 to be his due on account from the complainant, and this led to differences which culminated in his arrest on the charge of larceny, and the issuance of a search warrant for property which the complainant claimed that he had concealed. He was acquitted on the trial. This was followed by an attachment, in which McLeod was plaintiff, whereupon complainant filed the bill in this case for an injunction to stay the action at law and for an account-

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ing. The other defendants are charged with confederating with McLeod, and with having and withholding books and papers belonging to the complainant. There seems to be little justification for making them parties, and we see nothing to have prevented the trial of the differences between complainant and McLeod in the attachment suit. The defendants answered, the cause was heard upon the merits, and the bill was dismissed. It is before us upon appeal, and the principal questions relate to a few items of the account. The questions raised are all questions of fact. We have examined the record, and conclude that the testimony justified the result reached by the circuit judge. It would be profitless to discuss the testimony.

The decree is affirmed, with costs.

The other Justices concurred.

BEARD *v.* HOFFMAN.

1. MARRIED WOMEN—LIABILITY FOR GOODS PURCHASED.
   A married woman's promise to pay for furnishings of a house occupied by herself and husband is not operative as to purchases previously made.

2. SAME—IDENTITY OF ACCOUNTS—EVIDENCE.
   Evidence reviewed, and *held* to show without dispute that the account sued on was the same as that on which judgment had been obtained against defendant's husband; rendering the submission of that question to the jury reversible error.

Error to St. Clair; Thomas, J. Submitted April 10, 1903. (Docket No. 35.) Decided June 30, 1903.

Assumpsit by Agnes Beard against Wilhelmina Hoffman upon an assigned account for goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

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Stevens, Graham & Stevens, for appellant.

James L. Coe (*John B. McIlwain*, of counsel), for appellee.

MONTGOMERY, J. This action was brought to recover of defendant for furnishings of a house occupied by herself and husband, but the title to which was, during most of the period covered by the bill of particulars, in defendant. A large number of assignments of error are made, all of which have been examined. We need refer to but two.

The plaintiff's testimony tended to show that some time in June, 1894, defendant was present in the store of plaintiff's assignors, and pledged her credit for the goods thereafter furnished. It may be open to some question, on the testimony, as to whether the promise was the personal promise of defendant; but, if we assume that it was, it can only be operative as to the purchases made at that time and thereafter. As the case was submitted to the jury, a recovery was permitted for a small sum unpaid on items furnished in 1893 upon the credit of defendant's husband, Jacob Hoffman. This was an error, probably resulting from oversight, and, were it the only error, might be corrected by a reduction of the judgment.

But the defendant introduced in evidence proceedings had in justice's court, upon which a recovery was had by Asman & Beard against Jacob Hoffman for an amount approximating the amount of the present claim. Mr. Asman was a witness for the plaintiff, and testified that, so far as he knew, the firm of Asman & Beard had no other claim against Jacob Hoffman, outside of that involved in the present suit. The circuit judge charged the jury that, if the claim involved in the suit against Jacob Hoffman was the same as that involved in the present suit, it would result that Asman & Beard had elected to hold Jacob Hoffman, and plaintiff could not recover. It may be doubted whether this instruction did not go too far in treating the recovery of a judgment against Jacob Hoff-

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man as an estoppel. However this may be, it was certainly very convincing evidence, as in the nature of an admission that Jacob Hoffman was the original debtor. The vice in the instruction of which defendant has a right to complain is that it submitted to the jury, as a question of fact, the question of whether the claim there involved was the same as that involved in this suit. We think this was not an open question. We do not overlook the fact that in the suit in justice's court the declaration was upon the common counts and upon an assigned account, but there was no evidence before the jury as to any assigned account; and the identity of the claim is not only shown by the testimony of Mr. Asman, above referred to, but by the fact that the account was entered on the books of the attorneys as an account against Mrs. Jacob Hoffman, thus further identifying it with the account in question. Any inference of the jury that Asman & Beard held some other account, to which no one testifies, and of which Mr. Asman had no knowledge, would be a mere surmise, not based on evidence.

For this error the judgment will be reversed, and a new trial ordered.

The other Justices concurred.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN *v.* McGRATH.

1. BENEFIT SOCIETIES—CHANGE OF BENEFICIARIES—VESTED RIGHTS. The fact that the beneficiary named in a mutual benefit certificate is in possession thereof, and has paid the assessments and dues thereon, does not entitle her to object to the designation of a new beneficiary by the insured, pursuant to a by-law authorizing him to change his beneficiary at will, particularly where the payments are thereafter kept up by the new beneficiary.

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2. SAME—MENTAL COMPETENCY OF INSURED.

A beneficiary in a mutual benefit certificate has such an interest therein that she may contest the mental capacity of the insured to designate a new beneficiary, in accordance with the by-laws of the association.

Appeal from Wayne; Donovan, J. Submitted April 24, 1903. (Docket No. 178.) Decided June 30, 1903.

Bill of interpleader by the Grand Lodge of the Ancient Order of United Workmen against Anna McGrath, guardian of Lillian Belle McGrath, an infant, Ellen Frank, Stephen D. Gutchess, and Anna McGrath, to determine the right to the proceeds of a benefit certificate. From a decree for defendant Frank, defendant Anna McGrath appeals. Reversed.

Henry C. Walters, for appellant.

John H. Powell, for defendant Frank.

MONTGOMERY, J. James R. McGrath died on the 24th day of February, 1902, and at the time of his death was a member in good standing of the complainant order. His life was insured therein for $2,000. The original certificate was issued to him May 31, 1894, and, in accordance with his application, Anna McGrath, his wife, was designated in the certificate as beneficiary. On the 24th day of October, 1900, he surrendered the certificate in favor of his wife, and caused his daughter, Lillian Belle, to be designated as beneficiary. On the 26th day of December, 1900, he revoked that designation, and requested a new certificate to be issued to his mother, Ellen Frank, which was done by the complainant order, and a new certificate delivered to him. All changes were made under a by-law permitting a member to change his beneficiary at will.

The evidence tended to show that Anna McGrath kept up the payments on this certificate from the time it was issued, in 1894, up to the time the surrender was made, and a certificate taken out in the name of Ellen Frank,

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in 1900. From that time on, McGrath himself paid the assessments and dues, or they were advanced by Ellen Frank. There was also testimony tending to show that Ellen Frank herself paid some of the assessments and dues prior to the change in beneficiary, and that she contributed to the support of the deceased after the change was made.

In the course of the trial there was testimony tending to show that at the time of the surrender of the second certificate by James R. McGrath, and the issue of a new certificate by the company, James R. McGrath was mentally incompetent. The circuit judge was of the opinion that no one but the complainant could raise that question, and for this reason he excluded proofs which were offered on behalf of defendant Anna McGrath to show mental incompetency, and, upon the conclusion of the testimony, gave the decree in favor of the defendant Ellen Frank; directing that the money due upon this certificate be paid to her. The defendant Anna McGrath appeals to this court, and contends that she acquired a vested interest in the benefit fund by reason of her payment of the assessments, and in accordance with the agreement made between herself and husband when the certificate was issued; that, while the by-laws of the order authorize a change of beneficiary at the will of the member, they may not be invoked against the contract rights of a third party at the instance of another third party, who had no such rights; and the second contention is that the court was in error in holding that the relation of Anna McGrath to the contract was not such as entitled her to raise the question of the mental capacity of the deceased at the time of the attempted change of beneficiary.

As to the first question, we think no such contract is shown by this record as precluded the insured from changing his beneficiary in pursuance of the by-laws of the order. The bare fact that the certificate was in the possession of Mrs. McGrath, and that she made the payments for a time, is not sufficient to give her the right to protest

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against a change of beneficiary. Nibl. Acc. Ins. & Ben. Soc. § 227; *Fisk* v. *Equitable Aid Union*, (Pa.) 11 Atl. 84; *Appeal of Beatty*, 122 Pa. St. 428 (15 Atl. 861). Particularly is this true, as, after Mrs. McGrath ceased to make payments, Mrs. Frank, under very similar conditions, kept up the payments on this insurance.

We think, however, that the circuit judge was in error in holding that Mrs. McGrath was not in position to raise the question of mental incompetency at the time of the change in beneficiaries. This question was discussed in the case of *Grand Lodge A. O. U. W.* v. *Frank*, *ante*, 232 (94 N. W. 731). We there held that the beneficiary named in such a certificate has such an inchoate interest as entitles her to raise the question.

We have had some hesitancy in reaching the conclusion that this case should be reversed, for the reason that, upon the record as it now stands, the evidence of want of mental capacity is very far from convincing; but the circuit judge appears to have excluded the offer, very broadly made, to supplement this proof by evidence which might have been more convincing. We are therefore unable to say that no prejudice resulted to the appellant, but we think the case is one in which the costs of litigation should be left to abide the result.

The decree is reversed, and the case remanded for further proceedings.

The other Justices concurred.

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FIRST NATIONAL BANK OF HANCOCK *v.* STRINGER.[1]

SALE—IDENTITY OF SELLER—QUESTION FOR JURY—BILLS AND NOTES—FAILURE OF CONSIDERATION.

Plaintiff held a mortgage on certain wood, given by E. Defendant bought the wood, to be delivered in the future, giving his note to plaintiff for the purchase price. In an action on a renewal of the note, plaintiff contended that the wood was sold by E., plaintiff releasing its mortgage thereon, and applying the amount of the note on E.'s debt; while defendant claimed that he bought the wood of plaintiff. *Held*, that, if defendant's claim was true, the defense of a partial failure of consideration, due to the fact that all of the wood bought was not delivered, was available, but not otherwise; and that the question was a proper one for the jury.

Error to Houghton; Streeter, J. Submitted May 14, 1903. (Docket No. 69.) Decided June 30, 1903.

Assumpsit by the First National Bank of Hancock against James S. Stringer on a promissory note. From a judgment in its favor for less than the amount claimed, on verdict directed by the court, plaintiff brings error. Reversed.

Hanchette & Lawton, for appellant.

Chadbourne & Rees, for appellee.

MOORE, J. This is an action of *assumpsit* on a promissory note for $1,000, dated September 17, 1900, payable on demand, with interest at 7 per cent. per annum, signed by the defendant, James S. Stringer, and made payable to A. J. Scott, and by him indorsed on the back. The note is a renewal note of several former renewals, the original being given for the sale of cord-wood. The defense is

[1] Applications for rehearing denied September 22, 1903, and March 15, 1904.

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partial failure of consideration. The circuit judge directed a verdict. The plaintiff has brought the case here by writ of error.

The trial judge charged the jury, in part, as follows:

"At the time the original notes were given in this suit, the three parties, Eliassen and Stringer and the bank, by its cashier and one or two of its directors, were all together. There seems to be no question, from the testimony in this case, that each one of the three who were engaged in the transaction had full knowledge of all the facts. Under these circumstances, a bargain is made between the parties, by which Stringer is to purchase 1,500 cords of wood, and he gives his notes and cash for the amount of the 1,500 cords of wood, at the price of $3.25 per cord. The notes are given directly to the First National Bank, and by it, afterwards, according to the undisputed testimony, these notes are applied in reducing the indebtedness of Eliassen to the bank.

"Some of the wood is delivered during that season, and some the next season, until the note in this suit is made, and at that time it appears that there is some 261 cords which have not been delivered. The bank knows it, Eliassen knows it, and Stringer knows it, at the time the note is given; and, though there is change in the form of this note, there is no question made by the parties in this suit, gentlemen, that the change in the form makes any difference; that the note was intended to be given to the bank, just the same as the first notes were. The mortgage which the bank held upon Eliassen's property is still in force; Eliassen is still engaged in cutting wood and delivering; Stringer is still engaged in the wood business; and these facts are known to all the parties in the case; are known to the bank when this renewal note was given; and the fact is known both to the cashier and to Director Scott, of the bank, that the wood has not been delivered at this time.

"Now, it appears that subsequent to the delivery of this note to the bank,—the note that is in suit,—before the note has been paid, and before the 261 cords have been delivered, the bank forecloses its mortgage upon Eliassen's property, takes whatever wood he has, and whatever property he has, and makes it impossible for him to go on and deliver the wood. Now, under those circumstances, this note remaining due and unpaid, the bank sues Stringer in

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this court. The defense made here is that Stringer has a right to insist that there has been a failure, or partial failure, of consideration; that the bank knew all about that; that the money paid for the wood and the notes given for the wood went direct to the bank; and that he has a right to defend here in this suit, and have whatever the shortage amounts to allowed him. I think, gentlemen, that the law gives him that right, and that he can set up that defense.

"Then, what should you allow him if he has established his defense? Under the undisputed testimony, there is a shortage of 261 cords of wood, which was included in the amounts for which the original notes were given, at the price of $3.25 per cord. That, then, would amount to $848.25. You will also allow to the defendant at the rate of 25 cents per cord for wood that was not delivered on the scows, but was hauled, amounting, on the conceded facts, to $46.50. I think the defendant is also entitled to interest on the original notes, or their renewals, which he has actually paid to the bank, to the amount of the proportion thereof represented by the shortage in the wood delivered, which amount of interest is $73.50. There was a claim made and some testimony given as to the delivery of green wood, instead of dry. I think, under all the circumstances of this case, gentlemen, that the defendant is not entitled to any damages on account of the delivery of green wood. There is also a claim made for prospective profits, but I think, under all the circumstances of this case, that the defendant is not entitled to the loss of profits for the wood that was not delivered."

It is the claim of the plaintiff that the judge should have directed a verdict in its favor. It also assigns error because the disputed facts were not submitted to the jury.

The record discloses that one Eliassen was indebted to the bank in a large amount, and that the bank held a mortgage upon a large share of his property, including a quantity of wood. It is the claim of the plaintiff that defendant purchased of Eliassen 1,500 cords of wood, to be delivered later, for which he was to pay $3.25 a cord,—$500 to be paid in cash, and nine notes to be signed by Mr. Stringer, upon which there should be the name of an indorser; the notes to run directly to the bank,—and that

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the bank released its mortgage on the wood, and, by direction of Mr. Eliassen, deposited to the credit of Mrs. Eliassen $430, and canceled Mr. Eliassen's debt for the difference between that sum and the amount for which the wood was sold. It was the claim of the defendant that he made the purchase of the bank, and that he never received all the wood he bought, and that the note sued upon was a renewal of the original debt, and that he was entitled to the offsets as stated in the charge of the judge to the jury. Each of the parties gave testimony tending to establish their claim. The important question was one of fact, about which the parties disputed. The judge should not have directed a verdict. If the jury found the facts as claimed by the bank, it should have had a verdict for the full amount. On the other hand, if the purchase was made from the bank, as claimed by defendant, then a right result was reached.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

WALLACE v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. CARRIERS — INJURIES TO STOCK — NEGLIGENCE — QUESTIONS FOR JURY.

In an action against a railroad company by a shipper for damages arising out of defendant's alleged failure to transport and deliver with reasonable dispatch a car load of hogs, and to water them externally while in transit, by reason of which neglect a number of them died, plaintiff's witnesses testified that the car was dry the morning after its arrival, and that, if the hogs had been properly showered the day before, it would have presented a different appearance. There was also evidence that for at least two hours the car was left on a side track after a long journey, when it was possible to deliver

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the hogs promptly to a connecting road. *Held*, sufficient to go to the jury on the question of defendant's negligence in the respects alleged.

2. SAME.

It appearing that the delay while the car was in charge of defendant was during the most trying time of day, the jury might infer that defendant was responsible for the injury, rather than a connecting carrier to which the car was delivered.

3. SAME—CONTRACT OF SHIPMENT—CONSTRUCTION.

The bill of lading provided that plaintiff was, "at his own sole risk and expense, to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." Plaintiff did not accompany the stock, which fact was known to defendant's conductor. The testimony tended to show that an agent accompanying the hogs could do nothing in the way of drenching or showering them; and one of defendant's witnesses testified that it was considered the duty of the persons in charge of a stock train, in hot weather, to see that live hogs were showered when occasion required. The conductor testified that the men in charge of the train operated the appliances for showering, and it further appeared that defendant's superintendent had issued orders to drench all hogs. *Held*, that watering the hogs was a part of the actual duty of transportation, and that, as plaintiff's failure to accompany the car was not the occasion of the neglect of such duty, there was a case for the jury on the question of defendant's negligence.

4. SAME—CLAIM FOR DAMAGES—TIME FOR PRESENTMENT—WAIVER.

The bill of lading further provided that no claim for damages should be made unless filed within five days. Plaintiff's claim was filed one day late, but was returned to him to have the freight bill attached, which was done, whereupon defendant declined to settle, but not on the ground that the claim was filed too late. *Held*, a waiver of the provision as to time.

Error to Hillsdale; Chester, J. Submitted February 18, 1903. (Docket No. 100.) Decided June 30, 1903.

Case by John Wallace against the Lake Shore & Michigan Southern Railway Company for injury to a shipment

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of stock. From a judgment for plaintiff, defendant brings error. Affirmed.

Dallas Boudeman, for appellant.

B. E. Sheldon and *C. A. Shepard*, for appellee.

MONTGOMERY, J. This is an action of negligence; the charge being that defendant, having undertaken to transport a car load of hogs from North Adams to Cleveland, neglected to use reasonable dispatch, and did not deliver them at the stockyards within a reasonable time, and neglected to water the hogs externally while in transit, although the necessity for so doing was known to defendant's agents. It is charged that from the lack of such watering, and because of such neglect, a portion of the hogs died.

The testimony on the trial tended to show that the car was shipped from North Adams at 6:49 p. m., and that it was attached to a train at Hillsdale which had arrived there at 5:50, and was delayed, waiting for the car in question, and left Hillsdale at 8:30. The train was late in leaving North Adams, but, of course, as this was before the car was in transit, the plaintiff can make no complaint of this. After leaving Hillsdale the train went to Bawbeese Lake, and took on ten cars of ice, and arrived at Hudson at 11:10, and left at 11:50, having taken on one car and set out one. The train next stopped at Adrian, arriving at 12:30 a. m. of the 6th, and left at 1:50, having taken on thirteen cars and left off three. The train arrived at Air Line Junction at 5:25 a. m., where the car containing plaintiff's hogs was picked up by a through freight, and left at 7:35, arriving at Cleveland at 3:25 p. m., and was set out on the mud track, so called, and taken in charge by the Big Four Road at 5:20; the defendant road having no track running to the stockyards. The defendant's testimony tended to show that the hogs were showered at Hillsdale, Hudson, Blissfield, Port Clinton, Huron, and Cleveland. Plaintiff offered testimony of

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witnesses who saw the car on the morning of the 7th, to the effect that the car was dry, and that, if the hogs had been properly showered on the previous day, the car would have presented a different appearance. Plaintiff also offered testimony tending to show that shipments of cars from North Adams, made by the train to which this car was attached, would, in the regular course, reach Cleveland at 10 a. m. to 12 m. of the second day.

It is contended by defendant's counsel that the testimony conclusively established that there was no unwarrantable delay, and that the hogs were properly watered, and that there should have been a verdict directed on this ground. We think, however, that there was a question for the jury. There was room to find that at least for about two hours on the 6th the car was left on the side track after a long journey, and when it was possible to deliver the hogs to the Big Four promptly, and there was testimony from which it might be inferred that the hogs were not properly showered on the 6th. It is contended that it does not appear whether the damage occurred while the car was being transported by defendant, or later, while in charge of the Big Four; but the delay of defendant was during the most trying time of day, and from this circumstance the jury might have drawn the inference that defendant was responsible for the injury.

The defendant further contends that the court should have instructed a verdict for the defendant for the reason that there was no liability under the contract of shipment which was made. This contract is evidenced by the bill of lading, and contained the following provision:

"That the said shipper is, at his own sole risk and expense, to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same."

The plaintiff, although given transportation for the pur-

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pose, did not accompany the stock. The fact became known to the conductor of the freight train on the 6th. The testimony of defendant's witnesses tended to show that an agent accompanying the hogs could do nothing in the way of drenching or showering the hogs. One of these witnesses testified that it was considered the duty of the men in charge of a freight train in hot weather to see that live hogs are showered as occasion requires; "I don't see how the shipper could control the watering tanks." The conductor testified:

"From my experience as a conductor, I suppose it is true that fat hogs are a kind of live stock that you can't do anything for in course of transit, except to shower water over them and keep them cool. It is the men in charge of the train who operate those appliances."

The evidence further showed that orders were issued by the superintendent of the company to drench all hogs. It is difficult to see what plaintiff could have done, had he been with the stock to give notice to defendant's agent to perform this duty. And it may be said that this duty is a part of the actual duty of transportation. In *Heller* v. *Railway Co.*, 109 Mich. 61 (66 N. W. 670, 63 Am. St. Rep. 541), it is said:

"Upon ascertaining that plaintiff had no one in charge of the cattle, it would undoubtedly have been the duty of the defendant to unload and water and feed them, when, from any cause, it was unable to transport and deliver them within the usual time."

In the present case, notwithstanding this contract, there were certain duties which the defendant owed to the plaintiff; and, under the charge of the court, it must have been found by the jury that those duties were neglected. The failure of the shipper to accompany the car was not the occasion of the neglect of these duties, and therefore we think there was a case for the jury on the question of defendant's negligence.

The waybill contained another provision, that no claim for damages should be made unless filed within five days,

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and verified by the affidavit of the shipper or his agent. It appears that the claim was filed on the 13th, or one day late; but it also appears by the testimony of Mr. Miller, who acted for the plaintiff, that the claim was returned to him to have the freight bill attached, and that this was done, and the claim again placed with the defendant's agents, who, after examination and further correspondence, declined to make payment, but not upon the ground of the claim having been filed too late. We think this constituted a waiver of the right to insist upon time.

The judgment will be affirmed, with costs.

The other Justices concurred.

KROLL *v.* UNION TRUST CO.

BANKS—INSOLVENCY—SET-OFF AGAINST DEPOSIT—PARTNERSHIP.

A person gave his note to a bank for money borrowed to put into a firm which was about to be organized. The cashier was told that the money was to be used to buy goods for the new firm, that the receipts from the sale of the goods would be deposited with the bank, and that, when the note should fall due, it would be paid from this deposit. *Held*, that this did not make the firm liable for the loan, so as to entitle it to have the amount thereof deducted from its balance on deposit with the bank at the time of its suspension.

Appeal from Wayne; Donovan, J. Submitted April 23, 1903. (Docket No. 45.) Decided June 30, 1903.

Petition by Elijah Kroll, David Chatlin, and Mayer Davis, copartners as E. Kroll & Co., against the Union Trust Company, receiver of the City Savings Bank of Detroit, to have a certain note set off against a balance on deposit. From an order denying the petition, petitioners appeal. Affirmed.

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Jasper C. Gates and *Louis J. Rosenberg*, for petitioners.

Bowen, Douglas & Whiting, for defendant.

HOOKER, C. J. The defendant is receiver in a proceeding instituted by the State Commissioner of Banking to wind up the affairs of an insolvent bank, in which a copartnership, comprising the three appellants, had a balance upon deposit when the bank ceased doing business. They filed this petition in that proceeding, asking that the defendant be required to set off against and deduct from the balance aforesaid the amount of a promissory note held by the bank, which was made by one of the petitioners, Mayer Davis. He signed the note "Mayer Davis & Co.," that being the name under which he was doing business at the time. It is his claim that he and his co-petitioners had purchased a stock of dry goods, and needed $500, and that he was authorized by them to borrow it for the firm, and that the reason for not giving it in the firm name was that one Simon, the indorser, would not indorse for E. Kroll & Co., but would for Mayer Davis. The cashier did not know this, but was told that this money was to buy goods for E. Kroll & Co., who would deposit the money received from the sale of said goods with the bank, and, when the note should become due, the same would be paid from said money so deposited. Petitioners' counsel maintain that this arrangement made E. Kroll & Co. the debtors of the bank, and that the note was collateral, and therefore the firm was entitled to have the obligation applied in reduction of their deposit. On the other hand, the receiver claims that Davis borrowed this money, that he was not then a member of the firm, but expected to be, if he obtained and put into the concern this money, and that the transaction did not create an obligation against the firm which the bank could have enforced, and therefore it was not a proper subject of set-off, under the rule that a debt of the

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individual copartner cannot be set off against a firm demand.

It is difficult to avoid the conclusion that the bank lent this money to Davis upon his own paper, and that there was no binding contract on the part of Kroll & Co. It is not a case where the petitioners have shown that this money was borrowed by Kroll & Co., and that the note was merely collateral security. On the contrary, the testimony of the cashier is that Davis borrowed it to put into the proposed firm. There was no such firm then. There was to be, and he was to put in this $500. It was apparently part of the capital contributed by him, and raised upon his note. The circuit judge, who saw the witnesses, seems to have taken this view, and we are of the opinion that his order should be affirmed. It is so ordered, with costs.

The other Justices concurred.

NESTER *v.* TOWNSHIP OF BARAGA.

1. TAXATION—PERSONAL PROPERTY—PLACE OF ASSESSMENT—REVIEW.

   An assessment on personal property not subject to taxation at the place where assessed may be reviewed by the courts.

2. SAME—PARTNERSHIP—RESIDENCE—DIRECTING VERDICT.

   Though the residence of a copartnership for the purpose of taxation is a question of fact for a jury, where the evidence is uncontradicted the court may direct a verdict.

3. SAME.

   The business of a copartnership engaged in the manufacture and sale of lumber and the operation of a line of freight boats was *held* to have been "principally carried on," within the meaning of the tax laws, in the city where its office was located, its books kept, and its various interests directed, rather than in the township in which were situated its mills and lumber yards.

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Error to Houghton; Streeter, J. Submitted May 14, 1903. (Docket No. 76.) Decided June 30, 1903.

Assumpsit by George Nester, John F. Nester, Frank P. Nester, Mary N. Bourke, and Margaret Nester, copartners, doing business under the name of the Estate of Thomas Nester, against the township of Baraga, to recover taxes paid under protest. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

Philip R. McKernan (*M. J. Sherwood*, of counsel), for appellant.

Chadbourne & Rees, for appellees.

HOOKER, C. J. The plaintiffs are copartners living in different places,—one in Baraga county, and some in Detroit. Their business consists partly in lumbering, and they own and operate a sawmill in Baraga county, employing from 100 to 150 men in their business in Baraga county during lumbering seasons. They also own a number of vessels, tugs, and barges, and do a general freighting business, as well as business in connection with their lumber business. Their office is at Detroit, where their books are kept, and to which daily reports of the Baraga business are uniformly sent, and their business outside of the manual work of manufacturing and transportation is conducted. In the spring of 1900, the taxing officers of Baraga county sent to the plaintiffs the usual blank statements for listing property for taxation. There is no evidence that they were filled out and filed. Taxes were assessed, however, and it is claimed that the assessment of personal property includes property described on the roll and valued as follows, viz., "Steam vessels and barges, $50,000." The plaintiffs called upon the board of review at their place of meeting, being the occasion of their last meeting, and found the members there, and they protested against such assessment, and were informed that they

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were one minute too late, and no attention was paid to their complaint. Subsequently they paid the tax under protest, and brought an action for the amount. At the time of the assessment, none of the vessels, except possibly one tug, was in Baraga county, but they were elsewhere about the Lakes,—some at Buffalo, and one at Duluth. This property had been assessed at Detroit theretofore, and plaintiffs claim that it was assessed there the same year; *i. e.*, 1900. The court directed a verdict, and caused a judgment to be entered, in favor of the plaintiffs for $1,246, and defendant has brought the case to this court by writ of error.

Where a taxpayer's assessment is upon personal property not subject to taxation at the place where the property is taxed, the courts may review it. *City of Detroit* v. *Wayne Circuit Judge*, 127 Mich. 604 (86 N. W. 1032); *Woodmere Cemetery Ass'n* v. *Township of Springwells*, 130 Mich. 466 (90 N. W. 277). The claim that plaintiffs should have appeared before the board of review is not entitled to much consideration, in view of the proofs.

Counsel claim that the residence of a corporation is a question of fact for a jury. It is a question of fact, but, where the evidence is clear and uncontradicted, a verdict may be directed. We have held in some cases that the residence is the actual, rather than a fictitious, one, but there is nothing in this case to indicate that Detroit is not the *bona fide* residence of this concern.

We find no error in the proceedings, and the judgment is affirmed.

The other Justices concurred.

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WOOLCOTT v. WOOLCOTT.

DEEDS—CONDITIONS—SUPPORT OF GRANTOR—FORFEITURE—SEPARATE MAINTENANCE.

Where a father conveyed land to his son on condition that the latter should support him during the remainder of his life, a quarrel between the father and son, which was provoked by the father, but in consequence of which he left the son's home, was *held* insufficient to work a forfeiture of the estate conveyed, but the son was required to pay the cost of the father's maintenance so long as he should choose to reside elsewhere.

Cross-appeals from Berrien; Coolidge, J. Submitted May 13, 1903. (Docket No. 59.) Decided June 30, 1903.

Bill by Samuel Woolcott against Elmer L. Woolcott and Elizabeth A. Woolcott to set aside certain deeds. From the decree rendered, both parties appeal. Reversed (defendants prevailing).

George M. Valentine (*George W. Bridgman*, of counsel), for complainant.

Gore & Harvey, for defendants.

CARPENTER, J. The defendant Elmer is a son of complainant. About July 1, 1901, the defendants, who are husband and wife, at the request of complainant and his wife (since deceased), removed from their home in Nebraska to the farm occupied by complainant, situated near Watervliet, Berrien county, in this State. On the 24th of that month, complainant and his wife deeded said farm to defendant Elmer. That deed imposed upon the defendant the obligation to "support and maintain the said first parties during the term of their natural lives, he or she surviving, * * * furnish them with all the necessaries of life, suitable clothing, care for them in sick-

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ness as well as in health, pay all doctors' bills and funeral expenses, and erect suitable tombstones to their graves." The property transferred by said conveyance consisted of two parcels; one containing 45 acres of land, upon which the homestead buildings were situated, and the other containing 55 acres of land, situated in another section. Complainant and his wife had on the 25th of January, 1887, executed a deed which by its terms conveyed said 55-acre parcel to defendant Elmer, and on the 16th of January, 1899, had executed a deed which purported to convey said 45-acre parcel to defendant Elmer. This suit was brought to set aside these three deeds, on the claim that the deeds executed in 1887 and 1899 were never delivered, and that defendants had not complied with their agreement contained in the deed of 1901. The court below rendered a decree setting aside the deeds, and requiring complainant to pay defendant Elmer $1,637, to compensate him for losses incurred and money advanced. From this decree, both parties appeal.

Defendants contend that the deeds of 1887 and 1899 were delivered. We are bound, however, to conclude from their testimony that the deed of 1887 was executed to secure the payment of money owed by complainant to his son, and that the deed of 1899 was intended to vest title on condition that the son should remove to the farm, and there support his parents. Since, according to this testimony, the deed of 1887 was in equity a mortgage, and the deed of 1899 was delivered on conditions substantially like those contained in the deed of 1901, it is obvious that defendant's ownership of the land depends upon his compliance with the conditions contained in the last deed executed. As we are of the opinion that the testimony does not prove such a failure on the part of defendants to perform their agreement in that deed as to justify a decree setting it aside, it is unnecessary to determine whether or not the deeds of 1887 and 1899 were delivered, and whether or not any balance of the money secured by the deed of 1887 remains unpaid.

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The only time that defendants ever failed in any duty owed complainant was about the 1st of August, 1901, when complainant and defendant Elmer had a violent quarrel, the particulars of which are as follows: A misunderstanding, of no particular consequence, had arisen, about the place where a load of wood should be deposited. Complainant became passionately angry toward his son Elmer, and called him a number of vile names. The son, who, it seems, had inherited his father's disposition, was not as patient as he should have been, and, under the provocation, replied in language that a son should never use to a father. While the altercation was in progress, the defendant Elizabeth remonstrated with complainant. He thereupon turned and applied to her a vile epithet. Her husband, defendant Elmer, thereupon became violently enraged. He caught hold of his father, and quite violently, though in no way injuring him, forced him down into a chair. As soon as his anger had cooled, he felt ashamed of his conduct, and in a day or two expressed his feelings of repentance to his father, the complainant. About 10 days after this occurrence, during which interval no incident of consequence occurred, complainant and his wife, being instigated, as we feel warranted in believing, by their other children, removed from their home, and subsequently commenced this suit.

While we cannot approve the conduct of the defendant, we cannot agree with the trial judge that it should work a forfeiture of his estate in this farm. We agree with him that, "though his father was quarrelsome, it nevertheless became the duty of Elmer, under the circumstances, to exercise more than ordinary forbearance and patience." We look upon the misconduct of Elmer, however, as an outburst of passion naturally resulting, in a man of his temperament, from the misconduct of complainant himself. While it may be true, as stated by the trial judge, that "the whims and caprices of old age, however unreasonable, must be tolerated and forgiven by the child, when the parent has conveyed all his property to such child in

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consideration of maintenance," we cannot think that a single act of misconduct, provoked by a wrong done by the parent, is a sufficient ground for depriving the child of that property. To grant relief of that kind in a case like this not only affords a parent adequate protection against undutiful children, but it enables him, by his own wrong, to deprive those children of their property.

In our judgment, this case is much like the case of *Cornell* v. *Whitney*, 132 Mich. 300 (93 N. W. 614). We may properly say in this case, as we said in that: "Notwithstanding what has occurred, it is not at all unlikely that complainant may choose to return to defendants, and be entirely satisfied with his home with them. * * * At the same time, we do not think that complainant should be compelled, against his will, to take up his residence in their home. Under the circumstances of this case, a decree should be made compelling defendant" Elmer L. Woolcott "to reimburse complainant for the cost of his maintenance" since the time complainant left his home, "to pay such a sum each week as will secure complainant's proper maintenance during such time as he shall choose to reside elsewhere than in defendants' house, and to pay the medical attendance and funeral expenses," and to perform all other agreements and obligations imposed upon him by his deed. "The decree should, of course, recognize complainant's right to return to his home with defendants whenever he chooses to do so, and to receive there the full benefits of his contract, as originally contemplated. The conveyance in question should be declared a trust to secure the performance of these obligations, and, in case of their nonperformance, this trust should end, and the property revert to complainant. As the record does not show what complainant has expended for his past maintenance, or what will be a proper allowance for his future maintenance, the decree will be reversed, and the case remanded to the court below, to take proofs, and to enter a decree in accordance with this opinion. Complainant is entitled to costs of the trial in the circuit court.

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Defendants will recover costs of this court. These costs shall not be collected from the money owing by them to complainant, or from the property which is the subject of this suit."

The other Justices concurred.

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BLONDIN v. GRIFFIN.

1. TAX SALES—SETTING ASIDE—IRREGULARITIES—ESTOPPEL.
   A landowner is estopped to question the validity of the action of the auditor general in canceling the sale of his land to the State for taxes, and including the same in a subsequent petition, where, having full knowledge of the proceedings, he made no objection thereto until several months after the second sale, when, instead of redeeming therefrom, as he might have done, he resorted to a petition to have it declared void.

2. SAME—JURISDICTION.
   A tax sale cannot be set aside after confirmation, except for the reasons mentioned in section 70 of the tax law (1 Comp. Laws, § 3893), or where the court was without jurisdiction. Irregularity of the auditor general in canceling a prior sale to the State for the same tax is not ground therefor.

Appeal from Bay; Shepard, J. Submitted May 15, 1903. (Docket No. 92.) Decided June 30, 1903.

Petition by Theophile Blondin against Albert A. Griffin and others to set aside a tax sale. From a decree for petitioner, defendant Griffin appeals. Reversed.

Petitioner's lands were sold in 1895 and in 1896 for nonpayment of taxes assessed for the years 1893 and 1894, respectively, and were duly bid off to the State. The auditor general, upon his own motion, in 1901, set these sales aside, readvertised the land as delinquent, and the same was sold[1] on the 24th of March, 1902, under the

[1] The land was bid off to the State at the general tax sale in May, 1901; Griffin purchasing the State bid in March following.

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decree of the court, to respondent Albert A. Griffin for $140.93, being the taxes due and unpaid for the years 1893 and 1894. On June 17th following, petitioner filed this petition to have said sale declared void. Decree was entered in his favor upon payment of the taxes due within 10 days. From this decree defendant Griffin has appealed.

James Donnelly (*L. McHugh*, of counsel), for petitioner.

Albert McClatchey, for appellant.

GRANT, J. (*after stating the facts*). Petitioner is not entitled to the relief sought unless an unbending rule of law gives it to him. He knew that his taxes were unpaid, and that proceedings were instituted in 1901 for the sale of his land. The county treasurer had written him of the pendency of the suit, and that his land would be sold unless his taxes were paid. To this he paid no attention, did not appear in the suit, or even at the sale, to make protest. Nearly three months after the sale and after confirmation he applies to the court to have the sale set aside for the reason that the action of the auditor general in setting aside the sales in 1895 and 1896 is invalid. The cancellation of the sales for these years and the proceeding by the auditor general in 1901 to resell the land were not prejudicial to the rights of the petitioner; on the contrary, they were to his advantage, for it gave him another opportunity to pay his taxes. Petitioner was entitled to redeem from this sale by complying with Act No. 229, Pub. Acts 1897. Instead of complying with this statute, he chose to resort to this suit. We think his conduct estops him from now insisting upon this irregularity of the auditor general in canceling the sales and readvertising his land.

We are further of the opinion that the court could not open the decree, under *Brooks* v. *Auditor General*, 119 Mich. 329 (78 N. W. 125), and *Shefferly* v. *Auditor General*, 120 Mich. 455 (79 N. W. 693). The court had juris-

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diction to pass upon the question of the validity of this action of the auditor general. It did so, held the action valid, and entered the decree in pursuance of which the land was sold. After confirmation the court had no jurisdiction to set aside the sale, except for the reasons mentioned in section 70 of the general tax law (1 Comp. Laws, § 3893), or where the court had no jurisdiction. The only relief, under these facts, the law affords petitioner, is that provided by Act No. 229, Pub. Acts 1897.

Decree reversed, and petition dismissed.

The other Justices concurred.

DELL v. McBRIDE.

SLANDER—CHARGE OF PERJURY—EVIDENCE—QUESTION FOR JURY.

Where, in an action for slander based on defendant's statement, "You took my money, and went to Owosso, and swore to a God damn lie, and I can prove it, and, damn you, you are getting ready to swear to a lie again," there was testimony tending to show that the accusation was made shortly after the trial of an action at Owosso in which plaintiff and defendant were witnesses on opposite sides, plaintiff was entitled to go to the jury on the question whether defendant meant that the alleged false swearing occurred in a judicial proceeding.

Error to Shiawassee; Smith, J. Submitted May 15, 1903. (Docket No. 88.) Decided June 30, 1903.

Case by David Dell against James McBride for slander. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

John T. McCurdy, for appellant.

Q. A. Smith, *O. J. Hood*, and *A. L. Chandler*, for appellee.

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HOOKER, C. J. On the trial of this cause at circuit, the court directed a verdict for the defendant, upon the ground that the testimony failed to establish a *prima facie* case. The action was slander. No question arises over the sufficiency of the declaration. The words alleged were proved, and were as follows:

"You took my money, and went to Owosso, and swore to a God damn lie, and I can prove it, and, damn you, you are getting ready to swear to a lie again."

It is said that these words are not actionable *per se*, and that it was not shown that they referred to a judicial proceeding in which the alleged false statement was made.

It is true that the defendant did not state, in so many words, that it occurred in a judicial proceeding, but the proof is sufficient to warrant a finding that he referred to such an occasion. Two witnesses testified that an action was tried at Owosso where these parties were witnesses upon opposite sides, and that, shortly after, this accusation was made. The plaintiff should have been permitted to take the verdict of the jury as to whether the talk referred to this occasion. Defendant's point appears to be that the evidence does not show that defendant was alluding to that incident, but, as stated, we think it was fairly deducible from the proof.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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CONKLING v. NICHOLAS.

1. EVIDENCE—LOST DOCUMENTS—PROOF OF CONTENTS.
   The fact that, in reciting the contents of a lost letter, a witness states matters that would not be admissible as original testimony, is not ground for reversal.

2. SALE—DELAY IN SHIPMENT—RESCISSION—ESTOPPEL.
   A purchaser of goods is not estopped from refusing to accept them on the ground that they were not shipped within a reasonable time, where, though he was advised of the date of shipment a few days in advance, and made no reply, he had previously undertaken, in good faith, to countermand his order because of the delay, and supposed that word would be received by the seller in time to prevent the shipment.

Error to Delta; Stone, J. Submitted June 3, 1903. (Docket No. 13.) Decided June 30, 1903.

Assumpsit by Samuel P. Conkling against Andrew Nicholas for goods sold and delivered. From a judgment for defendant, plaintiff brings error. Affirmed.

Cummiskey & Yelland, for appellant.

G. R. Empson, for appellee.

MOORE, J. This action was commenced in justice's court. The case was appealed to the circuit court, where it was tried by a jury, which returned a verdict in favor of defendant.

The defendant is a hardware dealer living at Gladstone, Mich. His son was in charge of the store, and gave an order to Salesman F. W. Benedict for $51.30 worth of Asbestine. The formal heading of the order is as follows:

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"Order No. 142. May 7, 1900.
"THE ALDEN SPEARE'S SONS CO.
"On your approval ship to
Name of proprietor—A. Nicholas,
Hardware.
Town—Gladstone. State—Michigan.
How ship—By boat.
Terms—30 days net, f. o. b. Detroit.
—2 per cent., 10 days. 10 per cent off list.
"This order positively not subject to countermand, as it may be turned over to a jobber, to be shipped and billed. No agreement binding except it be in writing on face or back of this order."

It is the claim of defendant that, before these goods were received, the same person who gave the order wrote a letter directed to the Alden Speare's Sons Company, Detroit, Mich. This letter was afterwards returned to the defendant, and was shown to have been delivered to his attorney, and afterwards destroyed in a fire which destroyed his office. Upon the trial the writer of the letter gave parol proof of the substance of the letter, to the effect that it was too late to ship the goods; that it was agreed they were to be shipped not later than one week after the order was given; and not to ship the goods. He also testified he had no knowledge of any one in connection with the transaction except Alden Speare's Sons Company, and supposed their address was Detroit, as the goods were to be shipped from there. Alden Speare's Sons Company turned the order over to the plaintiff, who testified:

"The Alden Speare's Sons Company was a wholesale paint house, located at Boston, Mass. I had business dealings with them, and had an arrangement with them whereby they were to send an agent through this State to solicit orders for paints, and all orders so received were to be turned over to me to fill; I being a jobber, and I agreeing to fill all such orders by purchasing the necessary goods from them. F. W. Benedict was their agent in this State at that time. I received these orders about May 9th or 10th, 1900."

After the order was received by the plaintiff, he wrote the following letter:

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"DETROIT, MICH., June 5, 1900.

"Mr. A. NICHOLAS,

"Gladstone, Mich.

"*Dear Sir:* Referring to your order of May 7th, for Asbestine Cold Water Paint, we are pleased to advise that we are now in position to fill all orders for paint, and that shipment to you will go forward on the 8th inst. without fail."

He received no reply to this letter, and on the 11th of June shipped the goods. They reached the defendant the 18th of June, when he wrote plaintiff as follows:

"GLADSTONE, MICH., 19 June, 1900.

"S. P. CONKLING, Esq.

"*Dear Sir:* I wrote you not to ship Asbestine. It is so late now that I could not use it. It was to be here in a week. Now it is near five weeks, and the season is about over. I bought no Asbestine, waiting from day to day for your shipment, and lost sale then. It has made it bad all round. Will keep it here subject to your orders."

The plaintiff declined to take the goods back. The defendant did not use them, and they were destroyed by a fire which destroyed the store of defendant in the following year.

It was the claim of plaintiff that the goods were shipped within a reasonable time; that the order was not subject to countermand; and that, after he wrote defendant the letter of June 5th, it was the duty of defendant to reply to that letter, and that, as he did not, he is estopped from saying he was not obliged to receive the goods. It was the claim of the defendant that the bulk of his sales of these goods were made in April, May, and June; that goods should reach Gladstone from Detroit in from three to eight days; and that these goods were not shipped within a reasonable time, and that he had a right to countermand the order after an unreasonable time had elapsed, and that he did this by writing a letter addressed to the firm to whom he had given the order, addressed to the place from which the goods were to be shipped; that he had a right to assume that letter had not been received

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when the letter of June 5th was written, but that it would be received, so that a reply to the letter of June 5th was not necessary.

The judge submitted the case to the jury under a very carefully prepared charge. He told them, among other things:

"Now, gentlemen, whose goods were they at that time? If these goods were shipped and reached the defendant within a reasonable time, under all the circumstances of the case, the title passed to the defendant, and the defendant ought to pay this claim; and the loss would fall upon the owner, whoever the owner is, in the destruction of these goods. If, on the other hand, these goods were not shipped within a reasonable time, and the party promptly —and, as you will see, this shipment did not take place until the 11th, and on the 18th or 19th the defendant writes that the goods would not be accepted—I say, if they had not been delivered within a reasonable time, he had a right to refuse to accept them, and to say to the plaintiff that he would hold the goods subject to his (the plaintiff's) order; and, if a loss occurred, the loss would fall upon the plaintiff, the owner of the property, for the goods would not have become the property of the defendant.

"So that is all there is of it. Under all the circumstances in the case, taking into consideration that it was contemplated when the order was made that this bill of goods—this order of goods—might be filled by a jobber,—and you will say whether that naturally would take a little time, to get the order into the hands of the jobber, and to ship,—taking into consideration all these facts and circumstances, were the goods shipped within a reasonable time? If they were shipped within a reasonable time, then the plaintiff has complied with his contract and the contract of his assignor, as you might say,—it was simply assigned down to him by the house that took the order,—and the plaintiff ought to recover. But if, on the other hand, you shall say, under all the circumstances of the case, that the time was an unreasonable one, that a reasonable time in which these goods should have been delivered had passed, then the defendant was not obliged to accept the goods, and he could hold them subject to the order of the plaintiff."

Counsel say the court erred, as the order was a written

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one, in allowing Louis Nicholas to testify that it was orally agreed the goods were to be shipped not later than one week after the order was given; citing *Stange* v. *Wilson*, 17 Mich. 342. The record discloses that the testimony of Mr. Nicholas was in relation to the contents of a letter addressed to Alden Speare's Sons Company, which was shown to be lost, and was clearly competent.

It is claimed no letter was written countermanding the order until the goods were received. We think this is not a fair inference from the testimony.

It will be observed that the written order did not give the post-office address or place of business of the Alden Speare's Sons Company, though it does state the goods were to be shipped by boat, and the terms were 30 days, f. o. b. Detroit. It will also be observed that, notwithstanding the business arrangement testified to by Mr. Conkling, by which he was to fill the orders taken by Mr. Benedict, his name does not appear in the order. An examination of the record satisfies us the case was very carefully tried.

The judgment is affirmed.

The other Justices concurred.

RAMBO v. PATTERSON.

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1. CONTRACTS—FALSE REPRESENTATIONS—EVIDENCE.
   Testimony as to false representations made to induce plaintiff to enter into a contract is admissible, in an action to recover money paid thereon, as against an objection that it tends to vary the terms of the contract, which was in writing.

2. SAME—WAIVER.
   An agreement for the purchase by plaintiff of an interest in

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defendants' business gave him the right to terminate the arrangement, and to have his money refunded, in certain contingencies. He soon became dissatisfied, and an agreement for a settlement was entered into, which defendants failed to carry out; whereupon plaintiff at once brought an action for fraud and deceit in inducing the original agreement. *Held*, that he had not waived his right to bring such action.

Error to Wayne; Brooke, J. Submitted June 2, 1903. (Docket No. 4.) Decided June 30, 1903.

Case by William Rambo against William L. Patterson and John B. McKenney for fraud and deceit. From a judgment for plaintiff, defendant Patterson brings error. Affirmed.

Fink & O'Connor, for appellant.

Jay Fuller, for appellee.

GRANT, J. Defendants carried on a real-estate business in the city of Detroit. Plaintiff, an inexperienced country youth of 24 years of age, purchased of the defendants a one-third interest in the business, for which he paid $300. A written contract was entered into. Plaintiff brought this suit to recover the money so paid, on the ground that he was induced to enter into the contract under false and fraudulent representations of fact. According to the plaintiff's testimony, these representations were material, and were intentionally and maliciously false. Defendant Patterson denied them. Defendant McKenney was not sworn as a witness. It is not contended that the representations which plaintiff testified were made by the defendants are not sufficient of themselves to justify a recovery in a proper case, but they interpose two defenses, viz.: (1) That the contract was reduced to writing, and that the written contract must control; (2) that plaintiff did not act promptly, and by his conduct has waived the fraud.

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1. This is not an attempt to vary the terms of a written contract, but to maintain that it was obtained by fraud. Counsel for defendants cite *Bush* v. *Merriman*, 87 Mich. 268 (49 N. W. 567), and *Church* v. *Case*, 110 Mich. 624 (68 N. W. 424), to support their contention. The distinction in those cases is well drawn.

"Where parol evidence is offered to show that the written contract is void, or not of binding force, it is admissible; but if the object be to prove that it was intended to mean something different from what its language imports, it is inadmissible." *Atwood* v. *Gillett*, 2 Doug. (Mich.) 218.

It is true that plaintiff claims that the written contract, which he testified was read to him by one of the defendants, and then, under a frivolous excuse, was retained by them for a week before delivery to him, was not the contract verbally agreed to at the time he paid the money. Plaintiff testified that, when he told defendant Patterson that the written contract was not the one agreed to, Patterson did not deny it, but replied, "You are caught, and will have to stand it." The contract provides:

"It is also understood that such business is of such a problematical character that it is difficult to determine amount of profits to be made, and that first parties hold out no inducements and make no representations as to what said business has made, is making, and make no promises of what it may become in the future; and, save for the experience of one of said first parties, their lists of opportunities and business chances, and the good will of the aforesaid business, they contribute no further capital or assets to said copartnership business, and make no representations that they have any capital at the present time; and that the said W. Rambo, in so buying into said copartnership business, acts entirely upon his own judgment, and takes his chances upon the future of the business."

It is urged, and with some reason, that this singular provision was one of the means entered into by these defendants to carry out their conspiracy to defraud plaintiff. In reply to special questions, the jury found as follows:

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"*Q.* Did Patterson, according to the evidence submitted to you, at any time conspire with McKenney to cheat and defraud plaintiff?

"*A.* Yes.

"*Q.* Did Patterson at any time intentionally and fraudulently misrepresent facts concerning the business to Rambo?

"*A.* Yes."

We think there was ample evidence to sustain the verdict upon this branch of the case.

2. The contract also contained these two provisions:

"It is also hereby agreed that, if the share of profits of the second party amounts to $40 per month or more during the next three months, then this is to be an absolute and binding agreement, which cannot be repudiated or avoided for any reason. If said profits of second party do not amount to $40 per month during the next three months, then second party can, at his option, at any time give first party thirty days' notice in writing, and at the end of thirty days first party will return to second party said $300.

"If during the next three months first parties are dissatisfied with second party for any reason, they may, upon returning said $300 to said second party, and giving second party thirty days' notice, terminate said copartnership with said second party."

Substantially no business was done by the firm for the month after the contract was made. Meanwhile plaintiff, who had put all his money into this firm, desired to make some amicable arrangement to get out. They therefore made an agreement on the 30th day of November, 1901, settling their differences, plaintiff agreeing to take $75 and release all claims against the defendants. Fifty dollars was paid down. This agreement contained the following provision:

"Fifty dollars to be paid this day, and $25 to be paid on or before December 10, 1901. Until said $25 is paid, George E. Eckert is to hold this agreement and second party's articles of copartnership until December 10, 1901, and at that time, if said $25 is paid, to deliver to first parties the articles of copartnership and second party this

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agreement. If said $25 is not paid by that time, second party is to have his articles of copartnership back, and said $50 is to be forfeited to second party, and second party shall still hold his interest and membership in said copartnership, and this agreement shall be null and void."

Whether the $25 was tendered was the disputed question, and was submitted to the jury, who, in reply to a special question, found that it was not. The court instructed the jury that, if they found that this $25 had been tendered, the plaintiff could not recover. We think the plaintiff acted with sufficient promptness, and had not waived his right of action by his conduct. He obtained a verdict of $250, with interest, and it is affirmed.

The other Justices concurred.

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CARVEY v. DETROIT & MACKINAC RAILWAY CO.

CARRIERS—EJECTION OF PASSENGER—TICKETS—CUSTOM—EVIDENCE.

Where, in an action by a passenger for being ejected from a train, it appears that he presented a ticket which, on its face, entitled him to ride, defendant cannot show that it was the custom to issue such tickets for certain days only, and that published notice had been given accordingly, in the absence of any proof of knowledge of such limitation by the passenger or the purchaser of the ticket.

Error to Bay; Shepard, J. Submitted June 10, 1903. (Docket No. 54.) Decided June 30, 1903.

Case by Edna Carvey, by next friend, against the Detroit & Mackinac Railway Company, for a wrongful ejection from a train. From a judgment for plaintiff, defendant brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

Pierce & Kinnane, for appellee.

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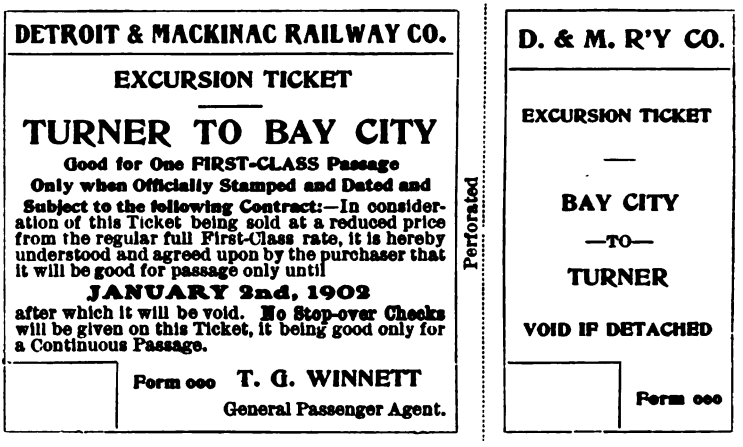
MONTGOMERY, J. This is an action in which the plaintiff recovered damages for being ejected from the defendant's car. The evidence discloses that she boarded the defendant's regular passenger train at Bay City on the 27th of December, 1901, and presented the following ticket:


DETROIT & MACKINAC RAILWAY CO.

EXCURSION TICKET

TURNER TO BAY CITY

Good for One FIRST-CLASS Passage

Only when Officially Stamped and Dated and

Subject to the following Contract:—In consideration of this Ticket being sold at a reduced price from the regular full First-Class rate, it is hereby understood and agreed upon by the purchaser that it will be good for passage only until

JANUARY 2nd, 1902

after which it will be void. No Stop-over Checks will be given on this Ticket, it being good only for a Continuous Passage.

Form 000 T. G. WINNETT

General Passenger Agent.

Perforated

D. & M. R'Y CO.

EXCURSION TICKET

BAY CITY

—TO—

TURNER

VOID IF DETACHED

Form 000

The conductor refused to receive the ticket, and compelled her to alight, and she was obliged to walk back to her home, following the track, and carrying a heavy valise.

No question is made that this ticket, on its face, showed the plaintiff entitled to a ride on the train in question, but it was sought to show that it had been the custom of this railroad company and others to issue holiday tickets, good on the 24th and 25th of December for a going passage, and good to return until January 2d, and likewise tickets good to go on December 31st and January 1st, and good for a return on January 2d, and that published notices that such tickets would be on sale were given. It was sought to limit the contract which the ticket imported by this testimony.

The undisputed testimony in the case shows that the

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person who purchased the ticket had no knowledge of this advertisement, or of any limitation of the ticket; nor was there any proposition to bring home definite notice to either the plaintiff or the purchaser of the ticket of any such limitation by custom. The testimony was rightly excluded. See *Keen* v. *Railway*, 123 Mich. 247 (81 N. W. 1084); *Hufford* v. *Railroad Co.*, 64 Mich. 631 (31 N. W. 544, 8 Am. St. Rep. 859); *Frederick* v. *Railroad Co.*, 37 Mich. 342 (26 Am. Rep. 531); 3 Thomp. Neg. § 2552.

Judgment will be affirmed, with costs.

The other Justices concurred.

DUBY v. FARMERS' MUTUAL FIRE-INSURANCE CO.

FIRE INSURANCE—CONDITIONS—WAIVER—EVIDENCE.

Plaintiff, a nonresident, applied to defendant company for insurance on a farmhouse, the risk being accepted on condition that all logs and brush be cleared for 100 feet around the building. She gave instructions to her tenant to clear away the rubbish, which he did to some extent. Thereafter the company made an assessment on the policy on the house, and took a new application on the barn located on the premises. It was claimed that a similar condition as to clearing was imposed with reference to the barn. Defendant's agent was at the premises when the barn was insured, and directed clearing within certain limits marked by him around the barn, which was done. The buildings were destroyed by fire, at which time there were some logs and brush within 100 feet of the house; but the fire was not aggravated thereby. *Held*, that such facts warranted a finding that the condition as to clearing had been waived.

Error to Cheboygan; Shepherd, J. Submitted April 24, 1903. (Docket No. 57.) Decided June 30, 1903.

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Assumpsit by Marie C. Duby against the Farmers' Mutual Fire-Insurance Company of Charlevoix, Emmet, and Cheboygan Counties on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Frost & Sprague, for appellant.

William N. Cross and *A. W. Shields* (*H. W. Harpster*, of counsel), for appellee.

HOOKER, C. J. The defendant is a mutual fire-insurance company, organized to insure farm buildings in three counties of this State. The plaintiff signed an application for a policy upon her dwelling on September 22, 1898. The premises were not then insurable, for the reason that there was no brick or tile chimney upon the house, as provided by article 4 of the charter of the company, plainly printed in the policy. Below her signature, under the head of "Remarks," was written the following:

"From 12 o'clock m. the 22d day of September, 1898.
"The risk on this house to commence as soon as secretary is notified that chimneys are built, and logs and all brush is cleared 100 feet all around the house."

The undisputed proof shows that this was upon the application when plaintiff signed it. The policy was dated October 10, 1898, and states that plaintiff "has this 22d day of September, 1898, become a member of the company, * * * and is insured," etc. Subsequently the chimney was built, and plaintiff notified the secretary of the fact, who states that he took it for granted that all of the conditions had been fulfilled, and indorsed the fact of receiving said notice on the application of the date of October 18, 1898. At the time the insurance was effected, plaintiff paid $1.50 membership fee and 20 cents premium. An assessment of 62 cents, payable on or before November 1, 1899, was made on this policy. It was paid October 1, 1899, and receipted for October 9, 1899.

On October 7, 1899, an application for insurance on a barn upon the premises reached the office of the company,

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upon which plaintiff paid 20 cents premium and 50 cents fees. Upon this application, under the head of "Remarks," the following appears:

"This application reached the office 10, 7, 99.
"O. T. BOOTH, Sec.

"Miss Duby has been notified to clear the brush and logs 100 feet from the barn before this risk will take effect, by R. D. Vermilya.
"O. T. BOOTH, Sec."

It was not shown that this was upon the application when signed. The insurance on the barn was indorsed on the original policy, in accordance with the usual practice, no new policy being issued. The house and barn were destroyed by fire in May, 1900, as a result of forest fires.

The defendant contests this cause upon the ground that the policy never became operative by reason of the nonperformance of the condition indorsed upon the application, which it claims to be a condition precedent. The plaintiff's counsel answer with the claim that, if a condition, it was waived by the assessment. The plaintiff lived at Columbus, Ohio. She had given instruction to her tenant to clear up this rubbish, and he had done something toward it, if not complied with the requirement. It is true that notice that it was cleared away was not given to defendant, but the action of the company in making an assessment and in taking a new application on the barn indicated that it was satisfied with what had been done, and was calculated to lead plaintiff to so understand. Its agent was on the ground and saw the condition of the premises when the barn was built, and the statement of the other agent, Vermilya, that appears on the second application, is denied by the plaintiff. She also stated that the agent Goodrich, who insured the barn, directed the clearing within limits marked out by him, which was done, and accepted by him as satisfactory. The finding of fact shows that there were some logs and brush within 100 feet of the house when the fire occurred, but they did not cause nor aggravate the fire. It was held that the pro-

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visions of the application had been waived by the acts of the defendant and its agents. We think there was testimony upon which such a finding might be based.

The testimony of Ellis as to his willingness to insure the property, if improperly admitted, was error without injury.

The judgment is affirmed.

The other Justices concurred.

VAN LESSLER *v.* ANN ARBOR RAILROAD CO.

MASTER AND SERVANT — LIEN FOR WAGES — POSSESSION OF PROPERTY — CONVERSION — ACTION BY SERVANT.

A person employed by the owner of certain charcoal kilns to fire the same, and to perform certain other work in connection therewith, at an agreed compensation, together with the use of a small house on the premises, with fuel and light, is in possession as an employé only, and not as a bailee for hire, and hence has no lien on the charcoal for his wages, entitling him to maintain trover against a railroad company shipping it away in disregard of his claim.

Error to Gratiot; Stone, J. Submitted June 3, 1903. (Docket No. 10.) Decided June 30, 1903.

Trover by John Van Lessler against the Ann Arbor Railroad Company. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Plaintiff was an employé of one Auten, who owned five charcoal kilns at Ashley, alongside the defendant's railroad tracks. His employment was to fire the kilns, to fight the fire that should at any time threaten to destroy the property, to look after the yard and property there, to

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see that nothing was taken from said yard except on orders from Auten, and to keep an account of the number of cars of coal shipped. As a compensation he was to receive $3 per kiln for firing, and $5 per month for the rest of the work, and the use of a small house on said premises, with fuel and light. Auten did not pay him, and plaintiff now seeks to recover the value of his services from the defendant railroad company in an action of trover. The court directed a verdict for the defendant.

John T. Mathews, for appellant.

T. W. Whitney, for appellee.

GRANT, J. (*after stating the facts*). Defendant was duly notified of plaintiff's claim, and forbidden to remove the coal, and shipped it after such notification. Plaintiff seeks to maintain this action upon the theory that he had possession of the coal, and that such possession gave him a lien upon the property, both at common law and by statute. His right of action depends entirely upon the question of possession.

That a bailee for hire has a lien upon the goods in his possession, and may retain such possession until he has received his compensation, is not disputed. Plaintiff was no more in possession than was any other employé of Mr. Auten. He had certain specific duties to perform in connection with the business. An employé charged with shipping machinery from the works of a manufactory, with counting the pieces of machinery as they were shipped, looking after the yard of the manufactory, preventing fires, and who slept in a part of the building, or was premitted to occupy a small building upon the grounds, might as well claim that he was in possession of the property, and could prevent shipments on the ground that he was an artisan and had a lien upon the property.

Counsel for plaintiff relies upon *Bank of Montreal* v. *Salt & Lumber Co.*, 91 Mich. 342 (51 N. W. 890). That case does not apply to this. In that case the contractor

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had complete and absolute possession of the salt until the delivery to the boats or vessels from the docks, and was responsible for it until that time. The contractor in that case was not simply an employé, as was the plaintiff in this.

Judgment affirmed.

The other Justices concurred.

WOLVERINE LAND CO. *v.* AUDITOR GENERAL.

TAXATION—INVALID DEED—REFUNDING—CONSTRUCTION OF STATUTE.

Section 103 of the tax law of 1869 (1 How. Stat. § 1104), providing for a refunding of the purchase money for a tax title where the same had been "annulled pursuant to law" for any of the causes enumerated in section 164, referred to an annulment in the method prescribed by section 101, and did not apply where the title had been declared void in some other proceeding.

Mandamus by the Wolverine Land Company to compel Perry F. Powers, auditor general, to refund the consideration paid for a tax title. Submitted June 2, 1903. (Calendar No. 19,831.) Writ denied June 30, 1903.

R. S. Woodliff and *D. W. Closser*, for relator.

Charles A. Blair, Attorney General (*Charles W. McGill*, of counsel), for respondent.

HOOKER, C. J. Relator's grantor bought the premises described in its petition at tax sale many years ago, for taxes assessed in 1876, taking an auditor general's deed in 1901. Subsequently one Michael Brenner, claiming to own the same in fee, filed a bill in the circuit court to cancel the auditor general's deed, and a decree was made

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in his favor. The auditor general was a party to this suit. Application was afterwards made to him to refund the amount bid for the land, with interest, and upon his refusal relator commenced this proceeding to compel it. Respondent answered, and relator replied, but it is unnecessary to refer to these pleadings further.

Relator's claim is based upon section 103 of Act No. 169, Laws 1869. Section 101 provides for the annulling of deeds in certain cases by circuit courts upon filing certain affidavits, etc., within two years, and within five years when the land was not subject to taxation, or when the taxes had been duly paid and receipted for. 1 How. Stat. § 1102. Section 103 provides:

"SEC. 103. In all cases where lands sold for taxes have been conveyed by deed, and the title has been annulled pursuant to law for any causes enumerated in section one hundred and sixty-four of this act, the auditor general shall, on presentation of a copy of the judgment annulling the same, refund to the holder of said title the purchase money and interest thereon, as the law requires, and certify the fact to the proper county treasurer." 1 How. Stat. § 1104.

Section 164 is as follows:

"SEC. 164. In all suits and controversies involving the title to land claimed and held by virtue of a deed executed by the auditor general of this State for nonpayment of the taxes thereon, the person claiming adverse title to such deed shall be required to prove, in order to defeat the title conveyed by such deed, either that the land described therein was not subject to taxation at the date of the assessment of the tax for which it was sold; or that the taxes, for the nonpayment of which such land was sold, were paid to the proper officer within the time limited by law therefor; or that the same had not been assessed for the taxes for the nonpayment of which it was sold; or that the same had been redeemed pursuant to law; or that a certificate, in proper form, had been given by the proper officer, within the time limited by law for paying taxes, or redeeming from sales made for the nonpayment thereof, stating that no taxes were due, or that the lands were not subject to redemption; but no person shall be permitted to

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question the title acquired by such auditor general's deed, without proving that he, or the person through whom he claims title, had title to the land at the time of the sale thereof for nonpayment of taxes, or subsequently, which title was acquired from the United States or from this State." 1 How. Stat. § 1166.

It is contended by counsel for the relator that section 103 authorizes a refunding wherever in any case involving the title to the land a circuit court has adjudged the tax deed invalid upon any of the grounds mentioned in section 164. We think otherwise. Section 103 limits the refunding to cases where the deed has been annulled pursuant to law for any of the causes enumerated in section 164. This section refers to the annulment provided for in the preceding section, viz., 101. Section 101 provides only for annulment, and is silent upon the subject of refunding. Section 103 provides for the refunding, but limits it by the provisions of section 164. Counsel say that this is not a limitation, because section 164 gives five reasons or grounds for contesting a deed, while section 101 gives but three for annulling; and it is urged that section 164 therefore enlarges the grounds mentioned as reasons for refunding, and, as section 101 does not make them all grounds for annulment, it must follow that section 103 includes some other method of annulment than that provided by section 101. Counsel's premises are faulty. Section 101 is broad enough to cover many irregularities not mentioned in section 164, but, while these are all grounds for annulment, they are not all grounds for refunding under section 103. Again, section 101 indicates a plain intent to limit the right to annulment to a short period, and is inconsistent with an intention to permit refunding at any time when the title may be attacked. This view of the case makes it unnecessary to discuss many questions that suggest themselves, including the effect of the repeal of the tax law of 1869, about which we express no opinion.

The writ is denied, with costs.

The other Justices concurred.

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CORBETT v. AMERICAN SCREEN DOOR CO.

1. INJURY TO EMPLOYÉ—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—FELLOW-SERVANTS.

   Where, in an action by an employé in a factory for injuries caused by the fall of a rack used for the storage of lumber, due to the act of defendant's foreman in directing that certain heavy pieces of lumber be placed thereon, it appeared that, while the rack had theretofore been used for light lumber only, no rule on the subject had been promulgated, that it had been built but two months, and that it was only partially filled on the occasion in question, the jury were warranted in finding that the foreman was using the rack for a purpose for which it was intended, and hence that plaintiff's injury was not due to the negligence of a fellow-servant.

2. SAME.

   The fact that the rack fell when only half full, and that the light material that was on it at the time constituted half the weight thereon, afforded evidence of the insufficiency of the rack under any theory.

3. SAME—ASSUMPTION OF RISK.

   It appearing that plaintiff had no occasion to use or to examine the rack, and he having testified that he supposed it was safe, and had no idea that it would fall, it could not be said that he had assumed the risk.

4. SAME—CONTRIBUTORY NEGLIGENCE.

   Nor could it be said, as a matter of law, that he was guilty of contributory negligence.

Error to Lenawee; Lockwood, J. Submitted May 13, 1903. (Docket No. 60.) Decided June 30, 1903.

Case by Ziba M. Corbett against the American Screen Door Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

John E. Bird and *Grant Fellows*, for appellant.

Herbert R. Clark and *Henry C. Smith*, for appellee.

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CARPENTER, J. Plaintiff, while in defendant's employ, was injured by the fall of a rack suspended from the ceiling of the room in which he worked. He brought suit, and recovered a judgment in the lower court. The serious question presented for our determination is this: Did the evidence warrant the jury in finding, as they did, that defendant was negligent in not building the rack sufficiently strong for the purpose for which it was intended? The evidence warranted the jury in finding that the rack fell because, by the order of defendant's foreman, certain heavy pieces of lumber were placed on it, and it also warranted their finding that due diligence would have discovered that the rack was not sufficiently strong to carry the load placed on it. It is the claim of the plaintiff that, in placing these pieces of lumber on the rack, defendant's foreman was using it for the purpose for which it was intended. Defendant claims that in so using the rack the foreman was using it for a purpose for which it was not intended, and that plaintiff's injury was due, not to a failure to furnish safe appliances, but to a misuse by a fellow-servant of an appliance which was safe for the purpose for which it was intended. The determination of this question requires no consideration of conflicting legal principles. If the rack was not safe for the purpose for which it was intended, the principle of law which required diligence of the defendant to furnish safe appliances applies. If the rack fell because it was used by the foreman for a purpose for which it was not intended, plaintiff's injury was due to the negligence of a fellow-servant, and he cannot recover.

Did the evidence justify the jury in finding that, in placing these pieces of lumber on the rack, defendant's foreman was using it for the purpose for which it was intended? The rack had been in use only a short time—less than two months—before plaintiff received his injury. We are to determine the use for which the rack was intended, not by ascertaining what was in the mind of defendant's manager or servant who made the rack, but by

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determining what use its employés to whom it was furnished had a right to make of it. No formal rules, either written or verbal, prescribed that use. Prior to plaintiff's injury, the rack had been used to hold "beading and light stuff generally, and pieces that had been cut; and during all the time up to the accident it was used just for the piling of light stuff that had been sawed up and cut, and not for the piling of the heavy lumber. * * * If they got a little more than they needed of one kind, they put it up there. * * * The boys in the shop used the rack to put material in." Oak moldings had also been placed on it. About two hours before plaintiff's injury, defendant's foreman directed one of his workmen to pile the pieces of lumber on the rack, which, as heretofore stated, occasioned its fall. These pieces were 15 or 16 in number. They were 15 to 18 feet long, and of more than ordinary width. They were heavy and wet. They were designed for a particular order, and were placed on the rack to enable defendant's workmen to pile other stuff in the place they occupied on the floor. The testimony, in our judgment, proves that no lumber as large or as heavy as these pieces had ever been placed on the rack before. Defendant contends that this circumstance makes it the duty of the court to decide, as a matter of law, that in placing these pieces on the rack the foreman used it for a purpose for which it was not intended. We cannot sustain this contention. The rack was apparently adapted to hold lumber of this size and weight. If defendant did not furnish this rack for the storage of lumber above a certain size and weight, it should have advertised its purpose by some appropriate instruction or notice. Failing to do this, it must be held to have furnished it for such purposes as its employés might presume to be proper,—to have intended that the employés using it should exercise a proper discretion in determining what material should be placed on it. In our judgment, the jury were fully warranted in deciding that the foreman, who, to get these pieces out of the way, ordered them placed in the rack, exercised a proper dis-

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cretion, and was using the rack for a purpose for which it was intended. The fact that the rack fell when only about half full, and that the light stuff that was on it constituted half the weight upon it, affords evidence that it was of insufficient strength to sustain a full load even of the light stuff which defendant claims it was intended to hold. The testimony, therefore, warranted the jury in finding that defendant was negligent, as charged in plaintiff's declaration.

Defendant also insists that a verdict should have been directed for the defendant on the ground that the plaintiff assumed the risk of the injury from the defectively constructed rack. We have recently had occasion to consider the doctrine of assumed risk in the case of *Bauer* v. *American Car & Foundry Co.*, 132 Mich. 537 (94 N. W. 9). That doctrine applies, as there stated, to dangers obviously incident to the discharge of an employé's duty. The injury from this defective rack was by no means an obvious incident of plaintiff's employment. He testified: "I supposed it was safe. I never examined it, and no one ever asked me. * * * I never had the slightest idea that the shelf was liable to fall." It was no part of his duty to examine the rack or to use it, nor can we say that it was obviously dangerous to one working near it.

The same reasoning which compels us to decide that plaintiff did not assume the risk forces us to say that he was not, as a matter of law, guilty of contributory negligence.

The judgment of the court below will therefore be affirmed.

The other Justices concurred.

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TOWN v. JEPSON.

1. SALE—DEFAULT OF BUYER—ABANDONMENT OF CONTRACT—RESCISSION.

   Where a contract for the sale of fruit made payment a condition to the transfer of the property, the buyer's refusal to pay for a third of the fruit as delivered, unaccompanied by any explanation, warranted a finding that he had abandoned the contract, justifying the seller in refusing to make further deliveries. *West* v. *Bechtel*, 125 Mich. 144, distinguished.

2. SAME—NONPAYMENT OF DRAFT.

   Where, under a contract for the sale of fruit, a sight draft on the buyer, with bill of lading attached, was to be sent to a certain place in Michigan, and, before the receipt of the draft, the buyer returned to his home in New York, instructing his banker in Michigan to return any drafts to the makers, with directions to forward them to a bank in New York, the seller, after the return of his draft marked "No funds," with the suggestion that it *might be paid* if sent to New York, was not bound to hold the fruit, and send the draft to New York, before he could treat the contract as abandoned.

3. SAME—AGENCY.

   The banker to whom the draft in such case was sent was not the agent of the seller, so as to charge the latter with the banker's neglect to notify him of the arrangement made by the buyer for the payment of the draft, but was the agent of the buyer.

4. SAME.

   But the banker through whom the draft was drawn *was* the agent of the seller, rendering the latter chargeable with such information as the banker received.

5. SAME—PLEADING—NOTICE OF DEFENSE.

   In an action for the breach of a contract for the sale of fruit, a notice attached to a plea of the general issue, setting up, in substance, that plaintiff agreed to have funds in the bank at a certain place to pay drafts for the fruit, which defendant was to draw from time to time as shipments were made, and that a draft for fruit shipped in accordance with the contract was returned unpaid, whereupon defendant, having heard that plaintiff had left the State, taking his funds with him, sold

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the fruit to third parties,—is sufficient to apprise plaintiff that defendant will rely on the former's abandonment of the contract.

6. SALE—MODIFICATION OF CONTRACT—PAROL EVIDENCE.
In an action for the breach of a contract for the sale of fruit, evidence that, after the execution of the contract, it was verbally agreed that defendant might ship in specified quantities, was admissible.

7. SAME—TERMS OF PAYMENT.
Where a contract for the sale of fruit provided for payment on "sight draft, with bill of lading attached," evidence of an oral agreement that the draft should be sent to a certain place was not objectionable as varying the terms of the contract.

8. SAME—NONPAYMENT OF DRAFT—ABANDONMENT OF CONTRACT.
The fact that a sight draft for the purchase price of fruit, sent to the place agreed upon, was returned unaccepted before the expiration of grace, did not prevent the seller from treating the contract as abandoned, particularly where the buyer had left the State with no intention of returning.

9. SAME—NOTICE OF RESCISSION.
Where the conduct of a buyer of goods is such as to warrant the inference of an intention to abandon the contract, the seller is not bound to give notice of an election to rescind, in order to be relieved from further performance.

Error to Ionia; Davis, J. Submitted May 13, 1903. (Docket No. 66.) Decided June 30, 1903.

Assumpsit by Lewis S. Town against Merton K. Jepson and Edward Jepson, copartners as Jepson Bros., for the breach of a contract for the sale of fruit. From a judgment for defendants, plaintiff brings error. Affirmed.

The notice attached to defendants' plea, referred to in the opinion, is as follows:

"*To the Above-Named Plaintiff:*

"You will please take notice that the above-named defendants will prove under the general issue above pleaded, and insist in their defense upon the trial of this cause, that, if they ever entered into the contract mentioned and set forth in the declaration of the said plaintiff, they were induced so to do by reason of the statements and

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representations made at the time of entering into the same by the above-named plaintiff, and in consideration of such statements and representations; that, if such contract was entered into, said plaintiff, at and before the time of entering into the same, stated and represented to said defendants that he, said plaintiff, was engaged in business at Manchester, in said State of Michigan, and then had a place of business at that village, and would continue to have such place of business and to be present at said village during the whole of the coming apple season, to wit, the apple season of A. D. 1898; that he had a bank account with the bank at Manchester aforesaid, and would continue to have and keep a bank account at said bank during the whole of the said apple season, and that he would continually have in such bank a sufficient amount of money standing to his credit to pay any and all drafts made upon him from time to time by said defendants for apples shipped by said defendants under the terms and provisions ot said contract; that in express reliance upon and in consideration of said statements and representations, and believing the same to be true, these defendants entered into said contract mentioned in said plaintiff's declaration, if they ever entered into same at all; that at the time of and after such agreement was executed and delivered, if the same was ever executed and delivered by said defendants to said plaintiff, it was agreed by and between said plaintiff and said defendants that, as fast as said defendants could manufacture and place in boxes for shipment 100 boxes of evaporated apples, such 100 boxes of apples were to be shipped to L. S. Town, in care of W. A. Banks Company, Cleveland, Ohio, and at the same time said defendants were to draw upon said plaintiff, with bill of lading attached to the draft, through the bank at Manchester, Michigan, for the amount of such shipment, and were to continue to make such shipments, and to draw in like manner for the amount thereof, until such contract had been satisfied, and that such draft so made should be paid at sight at said bank at Manchester, Michigan; that, in accordance with the terms of said agreement, on the 5th day of October, A. D. 1898, said defendants shipped 100 boxes of apples and made a draft therefor as agreed as above stated, and that on the 10th day of October, A. D. 1898, said draft was duly honored and paid by said plaintiff; that on the 22d day of October, A. D. 1898, said defendants again ship-

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ped 100 boxes of apples in accordance with the terms of said agreement, and made draft in like manner upon said plaintiff, but that said draft was, after the lapse of several days, returned by the bank at Manchester, Michigan, to said defendants, dishonored and unpaid; that said defendants heard nothing further from said plaintiff until on or about the 12th day of November, A. D. 1898, when they received a registered letter purporting to have been written by said plaintiff and mailed at Rose, New York, requesting said defendants to ship the balance of the apples to said plaintiff at Cleveland, Ohio, and to make draft at sight to the Briggs National Bank, Clyde, New York; that in the meantime, after the dishonor of said draft, and hearing that said plaintiff had left the State of Michigan and taken his funds with him, these defendants sold and contracted their evaporated apples to other parties, and at the time of the receipt of such registered letter the apple season was so far advanced that it was impossible to procure apples in order to comply with said contract with said plaintiff, even if they had not been discharged therefrom; that said defendants will insist upon the trial of said cause that, by reason of the facts above set forth, said defendants were absolutely released and discharged from any liability upon said contract, if such contract was ever entered into, or for any damages by reason of the nonfulfillment of the same."

A. F. & F. M. Freeman and *V. H. & H. H. Smith*, for appellant.

R. A. Hawley, for appellees.

CARPENTER, J. On the 28th of September, 1898, the parties to this suit entered into a written contract, reading as follows:

"*Witnesseth*, that the said Jepson Bros. hereby agrees to deliver and sell, and does sell, unto the said L. S. Town, 7½ tons of good, prime, wood-evaporated apples, at 5 cents per pound, to be packed in 50-pound boxes, net weight; * * * same to be delivered on or before November 15, 1898, f. o. b. cars at Saranac; terms, sight draft, with bill of lading attached. And said L. S. Town agrees to buy aforementioned stock on terms and conditions as specified. And it is agreed that said Jepson

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Bros. may furnish 5 tons more on same terms, if they make them. Weight guaranteed."

Defendants delivered on said contract only 100 fifty-pound boxes, or one-third of the amount contracted for, and, the market price of apples having advanced, this suit was brought to recover damages for the failure to deliver the remaining two-thirds. Defendants offered testimony tending to prove that, both before and after the execution of the contract, it was agreed that the draft referred to in said contract should be drawn on the plaintiff at Manchester, Mich., and that it would be honored at that place; that, after the execution of the contract, it was also orally agreed that defendants would ship 100 boxes at a time. October 5, 1898, defendants delivered 100 boxes, containing 5,000 pounds, and received their pay in the method agreed upon. October 22, 1898, defendants delivered to the railroad the second installment, consisting of 100 fifty-pound boxes, and drew upon plaintiff, with the bill of lading attached, at Manchester, Mich. This draft was returned without acceptance, with no information as to plaintiff's whereabouts, though very soon thereafter defendants learned from another customer of plaintiff's that he had gone to his home in the East. Regarding this as an abandonment of the contract, defendants sold their apples to a third person. They did not hear from plaintiff until they received a letter written by him and mailed at his home in New York November 9, 1898, directing them to ship the balance, and to draw on him for the amount through a bank at Clyde, N. Y. This defendants declined to do, on the ground that plaintiff's failure to honor the draft for the second shipment ended their obligations under the contract.

The court instructed the jury that, if the failure of the plaintiff to pay the draft indicated an intention to abandon the contract, their verdict should be for the defendants. They found for the defendants. Plaintiff insists that, in instructing the jury as above indicated, the trial court erred. He insists that under the decision of *West* v.

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Bechtel, 125 Mich. 144 (84 N. W. 69, 51 L. R. A. 791), plaintiff's failure to pay for this installment of the fruit did not warrant defendants' rescinding the contract. We do not think that decision applicable to the facts of this case. There it was held that "the mere refusal to pay for a portion of the property delivered until more was received would not alone constitute such a breach of the contract as would warrant the other party, the defendant, in repudiating the entire contract." That case, however, approves the language of Chief Justice Coleridge in *Freeth* v. *Burr*, L. R. 9 C. P. 208:

"The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract, and set the other party free."

We think a refusal to pay for a third of the property described in this contract, which payment was to be made as a condition of the transfer of that property, unaccompanied by any explanation whatever, would, without doubt, afford evidence of an intention to no longer perform the contract. See, also, *Withers* v. *Reynolds*, 2 Barn. & Adol. 882, cited in the opinion in *West* v. *Bechtel*.

Plaintiff insists, however, that the evidence in this case conclusively proves that there was not such a refusal. October 20, 1898, he returned to his home in Rose, N. Y., leaving funds in the bank at Manchester. He instructed the banker at Manchester, if drafts were drawn on him, to return them to the makers, and have them forward them on to the Briggs National Bank at Clyde, N. Y. Defendants drew their draft of October 22d through a banker at Saranac on the plaintiff at the bank in Manchester where plaintiff's funds were deposited. According to defendants' testimony, the draft and attached bill of lading were returned to the Saranac banker, with a letter from the Manchester banker, saying, "No funds," to-

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gether with the information that possibly, if a draft was sent to Clyde, N. Y., it would be paid. While the defendants testify that their banker did not communicate to them the information received by him, we think the case should be disposed of upon the assumption that they are chargeable with that information. Assuming defendants so chargeable, we do not think this information imposed on them an obligation to hold their fruit, and send their draft to Clyde, N. Y., upon the chance that plaintiff might there pay it. The draft not having been honored as agreed, defendants were not bound to follow plaintiff to another State upon the possibility that he would there perform a contract which he had already broken.

Nor can we agree with plaintiff that because defendants sent their draft to the bank at Manchester, where plaintiff did his business, that banker became their agent in such a way as to make them chargeable for his neglect. It is a fair inference from the record that the draft was sent to that bank because it was known that that was where plaintiff kept his funds in Manchester. If defendants dealt with the Manchester banker as the agent of plaintiff, —and in a sense he was the plaintiff's agent,—they did not make him their agent. There was an obligation on the part of the plaintiff, under the agreement he had made with the defendants, either to accept the drafts at Manchester, or communicate to them any change he made in his arrangements for their payment. The person, therefore, whom he selected to transmit that communication, was his agent, and he was chargeable for his neglect.

Plaintiff also insists that the Saranac banker had transmitted a draft for another customer of his to Clyde, N. Y.,—a draft drawn on plaintiff at that place,—and that defendants, having used this same banker, were charged with this information. It is a sufficient answer to this argument to say that the testimony does not make it conclusively appear that the Saranac banker obtained this information before he ceased to act for defendants. According to his testimony, he might have returned defendants' draft before that information was obtained.

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In our judgment, defendants are justified by this testimony in claiming that there was a refusal to pay for these 100 fifty-pound boxes of fruit without any explanation whatever; and, as heretofore indicated, this, in our judgment, warranted the jury in finding that plaintiff had evinced an intention to no longer perform the contract.

It is argued by plaintiff that the notice attached to defendants' plea of the general issue was not sufficient to justify their making the defense relied upon. Under the law as stated in this opinion, and the case of *Briesenmeister* v. *Knights of Pythias*, 81 Mich. 525 (45 N. W. 977), we are bound to hold the notice sufficient.

Plaintiff contends that the court erred in permitting defendants to prove that, after the contract was entered into, it was agreed that shipments of 100 fifty-pound boxes might be made by them. This testimony was clearly admissible. See *Summers* v. *Wagner*, 87 Mich. 272 (49 N. W. 570); *Freese* v. *Arnold*, 99 Mich. 13 (57 N. W. 1038).

Neither can we agree with plaintiff that parol testimony showing the agreement that the draft should be paid at Manchester was incompetent. This evidence did not tend to vary the contract. The contract contained these, and only these, terms: "Sight draft, with bill of lading attached." It was not only competent, but proper, for the parties to determine by an oral agreement upon whom these drafts should be drawn, and where they should be presented. *Liggett Spring & Axle Co.* v. *Michigan Buggy Co.*, 106 Mich. 445 (64 N. W. 466); *National Cash Register Co.* v. *Blumenthal*, 85 Mich. 464 (48 N. W. 622).

Nor is the point well taken that, because the acceptor of a sight draft has three days of grace, defendants were obliged to wait three days before treating plaintiff's failure to accept as an abandonment of the contract. While one who accepts a sight draft has three days in which to pay it, one to whom a draft is presented for acceptance has not three days in which to accept it. See *Case* v.

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Burt, 15 Mich. 82. After plaintiff had returned from Manchester to his home in New York with the intention of remaining, defendants were not bound to keep the draft at the Manchester bank three days upon the chance that he might return there and accept it.

Defendants were not, as contended by plaintiff, under an obligation to give notice of their election to rescind the contract. They had a right, under the facts as claimed by them, to treat the contract as rescinded by the plaintiff.

We have carefully examined the other assignments of error relied upon. In our judgment, they are not well taken, and do not warrant discussion.

The judgment will be affirmed, with costs.

The other Justices concurred.

ATTORNEY GENERAL, *ex rel.* MARR, *v.* BOARD OF EDUCATION OF DETROIT.

D. C. HEATH & CO. *v.* SAME.

1. EQUITY JURISDICTION—INJUNCTION—BREACH OF CONTRACT.
   A bill in equity will not lie, at the suit of a schoolbook publisher, to enjoin a board of education from making a change of text-books in the public schools, in violation of an alleged contract with complainant, as there is an adequate remedy at law.

2. SAME—UNCERTAINTY OF MEASURE OF DAMAGES.
   Equity will not entertain a bill to restrain a breach of contract solely because of the uncertainty of the measure of damages in case of such breach.

3. SAME—MULTIPLICITY OF SUITS.
   Nor, the contract covering a term of but three years, can a resort to equity be justified on the ground of preventing a multiplicity of suits, since that matter is entirely within the control of complainant.

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4. SCHOOLS AND SCHOOL DISTRICTS—ADOPTION OF TEXT-BOOKS—CONTRACT WITH PUBLISHER.

The provision of the free school text-book law, that books once adopted by the board shall not be changed within five years (2 Comp. Laws, § 4775), was designed for the protection of the public, and not for the benefit of book publishers; and hence a resolution of a board of education, directing the purchase of a certain number of copies of a specified text-book for use in the schools, did not, with the aid of such statute, amount to a binding contract between the board and the publisher of such book for the use thereof for the statutory period.

5. SAME.

Nor could the additional fact that the purchase was preceded by a letter from the publisher to the superintendent of schools, fixing the price of such book with a view to its "complete introduction" into the schools, operate to effect such contract.

6. SAME—SUFFICIENCY OF ADOPTION.

But such resolution constituted a sufficient adoption of the book to preclude the board from changing the same within the five years fixed by the statute.

7. SAME—LIMITATION.

In such case the five years began to run from the date of the resolution, and not from the time the book was completely installed in all the schools.

8. SAME—UNIFORMITY OF TEXT-BOOKS.

The provision of the statute (2 Comp. Laws, § 4775) that all text-books used in any school district shall be uniform in any one subject, requires uniformity of the books used in the same grade only, and does not require that all text-books used in different grades on the same subject shall be of the same series.

9. SAME—VALIDITY OF PURCHASE.

A resolution of a board of education to purchase certain text-books for "supplementary use" in the schools shows that there is no intention of adopting the books, within the sense of the statute, and the purchase is illegal and void.

Appeals from Wayne; Donovan, J. Submitted May 14, 1903. (Docket Nos. 71, 72.) Decided June 30, 1903.

Bills by Horace M. Oren, attorney general, on the

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relation of Maurice R. Marr and Peter Guenther, and by D. C. Heath & Company, against the board of education of the city of Detroit, to enjoin a change of text-books in the public schools. From decrees dismissing the bills, complainants appeal. Affirmed.

Complainant D. C. Heath & Co., a corporation organized under the laws of the State of Maine, filed this bill. It alleges that it is a publisher of schoolbooks known as "Walsh's Arithmetic;" that this arithmetic is divided into three volumes,—one called the "Primary," and volumes 2 and 3 the "Grammar School," parts; that the defendant school board solicited bids; that complainant put in a bid, which was accepted; that in August, 1897, the Walsh Grammar School Arithmetic was introduced by resolution of the school board of the city of Detroit, directing the purchase of a certain number of copies thereof for use in the schools; that similar resolutions followed in September and December, by which the Grammar School Arithmetic was adopted in accordance with said bid and proposition; that the exchange for the old arithmetics was carried out as fast as was feasible; that this Grammar School Arithmetic was not fully installed until May, 1898; that the Primary Arithmetic has never yet been fully installed; that on August 22, 1901, the school board passed a resolution directing that the Werner Primary Arithmetic be adopted for use in the schools, and that on July 24, 1902, the board passed another resolution directing that the Werner Arithmetic be adopted for general use in the grammar grades; and that these resolutions are void. The prayer of the bill is that the resolutions adopting the Werner Arithmetic be declared void, and the defendant enjoined from proceeding thereunder, and from discontinuing the use of complainant's arithmetic in the schools of the city. This bill was filed August 8, 1902. On August 25th the attorney general filed a similar bill upon the relation of two citizens and members of the school board. The prayer of the latter bill is—

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"That the date at which the Walsh series of arithmetics was adopted and actually introduced into the schools of the city of Detroit may be fixed and determined by the decree of this court, or, if it is competent to introduce only a part of a text-book into the public schools, that the date at which the Walsh Primary Arithmetic was introduced into the schools may be ascertained and determined by the court, and also the date at which the Walsh Grammar School Arithmetic was introduced into the schools may be determined and ascertained; that the introduction of said Werner's Primary Arithmetic may be declared to be illegal, and the said board ordered and directed to withdraw said arithmetic from the public schools; that said board may be temporarily and perpetually enjoined from making any change in the text-books in use in the public schools of the city of Detroit, unless the full period of five years of their actual introduction and use in the public schools has expired, and that said board be temporarily and perpetually enjoined from withdrawing the Walsh Arithmetics from the public schools of said city until after the 1st day of September, 1905."

By stipulation the two suits are consolidated and heard as one. Answers were duly filed, proofs taken, and decrees entered dismissing the bills.

The laws of the State applicable to the questions raised are section 4680 of the general school law (2 Comp. Laws), which provides, among other things, that:

"Text-books once adopted under the provisions of this act shall not be changed within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or at a special meeting called for that purpose."

And section 4775, known as the act "providing for free school text-books," which also provides that "text-books once adopted under the provisions of this act shall not be changed within five years," and that "all text-books used in any school district shall be uniform in any one subject."

And section 4776, providing as follows:

"The district board of each school district shall select the kind of text-books on subjects enumerated in section

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one to be taught in schools of their respective districts: *Provided*, that nothing herein contained shall require any change in text-books now in use in such district. * * * If a majority of all the voters, as above provided, present at such meeting, shall authorize said board to raise by tax a sum sufficient to comply with the provisions of this act, the district board shall thereupon make a list of such books, and file one copy with the township clerk, and keep one copy posted in the school, and due notice of such action by the district shall be noted in the annual report to the superintendent of public instruction. The district board shall take the necessary steps to purchase such books for the use of all pupils in the several schools of their district, as hereinafter provided. The text-books so purchased shall be the property of the district purchasing the same, and shall be loaned to pupils free of charge, under such rules and regulations for their careful use and return as said district board may establish."

And section 4777, which provides as follows:

"It shall be the duty of the district board of any school district adopting free text-books provided for in this act to make a contract with some dealer or publisher to furnish books used in said district at a price not greater than the net wholesale price of such books."

And section 4780, which provides as follows:

"That school districts in cities organized under special charters shall be exempt from the provisions of this act, but such districts may, when so authorized by a majority vote of their district boards, submit the question of free text-books to the qualified voters of said districts. If a majority of the qualified electors vote in favor of furnishing free text-books, such district boards shall have authority to proceed under the provisions of this act."

In November, 1891, the question was submitted to the voters, and they adopted the free text-book system. It has been in operation in the district since that time.

Horace M. Oren, Attorney General, and *Herbert L. Baker* (*Fred A. Baker*, of counsel), for complainants.

T. E. Tarsney and *P. J. M. Hally* (*H. H. Hatch*, of counsel), for defendant.

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GRANT, J. (*after stating the facts*). The questions presented are these:

(1) Has complainant D. C. Heath & Co. presented a case for equitable relief by injunction?

(2) Has any one or all of the Walsh series of arithmetics been adopted, so as to bring it within the five-year limit?

(3) When was the Walsh Grammar School Arithmetic adopted?

(4) Did the adoption and use of the Walsh Grammar School Arithmetic carry with it the adoption of the Walsh Primary Arithmetic?

(5) Has the Walsh Primary Arithmetic been adopted?

1. If the complainant D. C. Heath & Co. has any standing in the court, it is because it has made a valid contract with the defendant for five years, either for its entire series of arithmetics or for the Grammar School Arithmetic. It seeks an enforcement of this contract in equity. If it has a valid contract, its remedy at law is complete, in the appropriate action for breach of contract. Counsel cite in support of their right to maintain this suit *Steward* v. *Winters*, 4 Sandf. Ch. 587; *Hamilton* v. *Dunsford*, 6 Irish Ch. 412; *Kemp* v. *Sober*, 1 Sim. (N. S.) 520. In *Steward* v. *Winters* a lessee was restrained from carrying on a business upon the rented premises, which he had covenanted not to carry on. In *Hamilton* v. *Dunsford* it was held that the court had jurisdiction to grant relief on a covenant not to remove machinery from a mining property. In *Kemp* v. *Sober* the defendant was carrying on a business contrary to the covenants in the deed of conveyance to him. He was properly enjoined.

It is urged as a ground for equitable interference that the measure of damages is uncertain, and that the thing itself is what the complainant seeks, and that to which it is entitled. It is not a ground of equitable jurisdiction that, in case of a violation of a contract, the damages are uncertain. If parties have deliberately made such a contract that, in case of a violation by either, no damages can be assessed on account of uncertainty, certainly equity can-

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not for that reason compel either party to perform the contract.

There is no occasion to resort to equity to avoid a multiplicity of suits. Its contract had only three years to run from the date of the commencement of this suit. It could wait three years and bring one suit for damages, or could bring a suit at the end of each year, or as often as it chose, to recover damages. It was not threatened with a multiplicity of suits. The number of suits it might bring would be of its own choosing. The jurisdiction of chancery to avoid a multiplicity of suits has no application to this case.

The mere requirement of the law that books, when adopted, shall not be changed for a given time, and the resolution for the purchase of complainant's Grammar School Arithmetic, to take the place of those then in use, did not constitute a binding contract between complainant and defendant. That law was enacted, not for the protection of book dealers, but for the protection of the public. *Bancroft* v. *Thayer*, 5 Sawy. 502 (Fed. Cas. No. 835).

The law requires boards of education to enter into contracts with some dealer or publisher for the purchase of books at not to exceed wholesale prices. No such contract was made. The several resolutions of the board for the purchase of this arithmetic, under the advertisements for bids, and the furnishing of them by D. C. Heath & Co., did not constitute a five-year contract. These transactions covered only the books they purchased. The board, at a meeting held August 4, 1897, recommended the purchase of 400 Walsh's Grammar School Arithmetics. On August 25, 1897, the agent of complainant wrote to the superintendent of public schools of Detroit a letter, in which he said:

"Looking to the complete introduction of the Walsh series arithmetic into your schools, we beg to make the following proposition."

Here follows the proposition, giving prices of the Walsh Arithmetics, and the price to be paid for those which they were to supplant. Other correspondence passed between

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this agent and the superintendent. This correspondence did not make a five-year contract, and, besides, there is no evidence that it was submitted to the board, and action upon it taken by them.

It follows that the bill of D. C. Heath & Co. was properly dismissed.

2. But, upon the bill filed by the attorney general on behalf of the people, the whole subject is open for investigation. An examination of the record conclusively shows that the defendant board had paid little heed to the law. It has not entered into contracts as the law provides it should, but has substantially ignored the law, and now insists that there is no valid adoption of any text-books, for the reason that it has not complied with the law. That the rights of the people under the law should be thus ignored will not be approved by the courts, if the action taken by the board of education can be reasonably construed into an adoption of a text-book, within the spirit of the law. It does not lie in the mouth of this defendant to say to the people of the school district: "By resolution, we have substituted one text-book for another; have provided for the purchase of a new in exchange for the old. We have not complied strictly with the law in adopting this text-book, and therefore we are at liberty to at any time make another change." To uphold such a contention would be little short of a disgrace to the administration of law, and put it in the power of every school board in the State to virtually annul the law, as the defendant apparently has done in this case. We are therefore constrained to hold that the resolution in August, 1897, for the purchase and use of the Walsh Grammar School Arithmetic, was a sufficient compliance with the law, and that it was not in the power of the defendant to change it within five years.

3. We are of the opinion that the five years began to run from the date of the adoption of the resolution for the purchase and use of the Grammar School Arithmetic, and not from the time this arithmetic had been completely

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installed in all the schools, in place of the others which it supplanted. Steps were immediately taken to introduce this book in the schools. There is no reason to doubt that the defendant used reasonable diligence in complying with the wishes of the district, as indicated at the election, and in placing this arithmetic in the schools. There might be very good reasons why the change should not be made all at once. The language of the statute is "adopt." Books are adopted when such action as the statute provides is taken, and not when every other book then in use has been removed, and the new one substituted. We think that this is the plain meaning of the statute. Unless this be so, the adoption must in most instances take place at some indefinite time after the resolution of adoption, for it would be impossible to effect a change immediately. If in the resolution of adoption a definite time were fixed for the installment of the new book, another question would be presented, upon which we express no opinion. Under this holding, the five years for the use of the Walsh Grammar School Arithmetic had expired. *Jones* v. *Board of Education*, 88 Mich. 371 (50 N. W. 309).

4. The adoption of the Walsh Grammar School Arithmetic did not mean the adoption of the Primary Arithmetic by the same author. Educators may think that the primary arithmetic of one author is better than that of another, and that the higher arithmetic of the other author is better. This law does not mean that the school board is obliged to use all the books of the same series for all the grades of the school. They are at liberty to select what shall be used in each grade, and as to those there must be uniformity. The term "uniformity" does not mean that all the text-books of one author in grammar, arithmetic, history, physiology, etc., for the different grades of scholars, must be used. Boards of education are at liberty, under this law, to adopt the book of one author for use in all the primary departments, and the book of another author on the same subject in all the grammar or higher depart-

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ments. All the law requires is that they be uniform in the same grade.

5. On August 23, 1900, the defendant board passed a resolution to purchase 4,000 copies of Walsh's Primary Arithmetic, at 24 cents per copy, for "supplementary use." This purchase was wholly illegal. The sole authority for such purchases must be found in the statute. *Detroit Board of Education* v. *Detroit Common Council*, 80 Mich. 548 (45 N. W. 585). Upon the face of the resolution, it appears that they were not purchased for general use in the schools, or with any intention of adoption. On the contrary, the language of the resolution is repugnant to any intention to adopt. It follows from the above that Walsh's Primary Arithmetic has never been adopted.

Under the above holding, both decrees must be affirmed.

The other Justices concurred.

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MORLEY BROS. *v.* STRINGER.

1. JUDGMENTS—COLLATERAL ATTACK—BILL IN AID OF EXECUTION.
   On a bill in aid of execution, the judgment cannot be attacked for mere irregularities.

2. FRAUDULENT CONVEYANCES—CONSIDERATION.
   A conveyance made in fraud of creditors, while valid as between the parties, is absolutely void as to creditors, irrespective of the consideration paid by the grantee.

3. SAME—TENANCY IN COMMON—PAYMENT OF MORTGAGE—REIMBURSEMENT.
   Where a tenant in common of land incumbered by mortgage, with the active co-operation of his co-tenant, made a conveyance of his interest for the purpose of defrauding creditors, and the co-tenant, in furtherance of such purpose, paid off the mortgage, taking a new mortgage from the fraudulent grantee for the amount chargeable against such interest, such co-tenant was not entitled to be reimbursed for such payment, in a suit by a judgment creditor to set aside the conveyance.

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Appeal from Genesee; Wisner, J. Submitted May 15, 1903. (Docket No. 86.) Decided July 8, 1903.

Bill by Morley Brothers, a corporation, against Marshall L. Stringer, Zachariah Stringer, Edgar J. Osband, and Grant Parker, in aid of execution. From a decree for complainant, defendant Marshall L. Stringer appeals. Affirmed.

This is a bill filed in aid of an execution. The facts are found in the decree of the court, and are as follows:

"1. The firm of Parker & Dunstan, composed of Grant Parker and John W. Dunstan, while conducting business at Otisville, Michigan, contracted a considerable amount of indebtedness to the complainant and other creditors. The firm of Parker & Dunstan was dissolved by the parties in the latter part of the year 1889; the said Dunstan being succeeded by the said Marshall L. Stringer; the firm name being changed to Parker & Stringer.

"2. In the early part of the year 1890, the debt due said complainant remaining unpaid, as well as the claims of other creditors of Parker & Dunstan, and it becoming apparent to the said Grant Parker and Marshall L. Stringer that their said business might become embarrassed by suits against the said Parker, and for the purpose of protecting the said Parker and the said business, Grant Parker and wife made, executed, and delivered to Zachariah Stringer and Edgar J. Osband, of Otisville, Michigan, a deed of the building occupied by Parker & Stringer, described as lots 1 and 2, Freeman & Crowles' addition to the village of Otisville (Grant Parker owning an undivided half interest), county of Genesee, this State, except six feet off the east side thereof, subject to a mortgage of $700 on said interest; and also at the same time said Parker made, executed, and delivered to Zachariah Stringer and Edgar J. Osband a bill of sale of his interest in the stock of goods of the firm of Parker & Stringer; such firm name being immediately changed to M. L. Stringer & Co.

"3. All of said conveyances and transfers of property so made by said Parker were wholly without consideration, and were made and taken for the purpose of hindering, delaying, and defrauding the creditors of Parker & Dunstan, including the complainant. The said defendants

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severally participated in such fraud. The said Marshall L. Stringer, Zachariah Stringer, and Edgar J. Osband assisted, aided, and abetted the said Parker in perpetrating such fraud on the complainant and other creditors.

"4. All of said defendants so conspired, concerted, and confederated together so that all the property of the said Parker that might have been reached and taken to satisfy the claims of such creditors was placed and kept out of the reach of creditors; and said defendants thereby hindered, delayed, and defrauded such creditors in the collection of their just demands.

"5. The above-described real estate, at the time of such transfer, was incumbered by a mortgage held by the Genesee County Savings Bank; and the said Marshall L. Stringer, claiming to own a half interest in said real estate, paid such mortgage indebtedness, and the same was discharged from record. Thereafter, in the year 1894, and while the interest of said Parker therein remained in the name of Zachariah Stringer and Edgar J. Osband, of record, the two defendants last named made, executed, and delivered to the said defendant Marshall L. Stringer a mortgage on an undivided half interest in said real estate, and said mortgage was thereafter foreclosed, and said premises sold thereunder, and a sheriff's deed given therefor to said Marshall L. Stringer; said mortgage being recorded in Liber 118 of Mortgages, at page 538, Genesee county records, and said mortgage being for the consideration therein named of $813.25. Said sheriff's deed was recorded in Liber 1 of Sheriff's Deeds, page 538, Genesee county records.

"6. The said Marshall L. Stringer, while participating in and aiding in the fraudulent transaction as herein stated, was guilty of fraud in taking and recording said mortgage, and in foreclosing the same, and in obtaining and recording said sheriff's deed.

"7. The payment by the said Marshall L. Stringer of the mortgage on said premises so held by the Genesee County Savings Bank was voluntary, and made at a time when the said Marshall L. Stringer, Zachariah Stringer, and Edgar J. Osband had control and apparent ownership of all the property of the said Grant Parker.

"8. The executing and recording of said mortgage from said Stringer and Osband to Marshall L. Stringer operated to still further hinder, delay, and defraud the said complainant and other creditors of Parker & Dunstan.

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"9. On the 17th day of April, A. D. 1893, the said complainant obtained a valid judgment against the said Grant Parker and John W. Dunstan for the sum of $254.23 damages and $29.40 costs of suit, and said judgment remains of force and unpaid, both at the time of the filing of the bill of complaint herein and at the time of the rendition of this decree; and there is now due and remaining unpaid on said judgment, for principal and interest, the sum of $466.81.

"10. For the purpose of collecting said judgment, said complainant caused an execution to be issued out of, and under the seal of, the circuit court for the county of Genesee, where said judgment was rendered, and has caused said execution to be duly levied upon the real estate above described, and notice of such levy was duly filed in the office of the register of deeds of said county, and said judgment remains unsatisfied and unpaid."

Proofs were taken in open court, and decree rendered for complainant.

Brown & Farley, for complainant.

Lee & Parker (*Edward J. Bissell*, of counsel), for appellant.

GRANT, J. (*after stating the facts*). Counsel for the defendant raise objections to the validity of the judgment rendered in the suit at law. They make no argument upon them, and the pleadings upon which they are based are not found in the record. Therefore they cannot be considered. Enough, however, does appear to indicate that they constitute a collateral attack upon the judgment, which cannot be maintained, under *Griffin* v. *McGavin*, 117 Mich. 372 (75 N. W. 1061, 72 Am. St. Rep. 564), and *Peninsular Savings Bank* v. *Ward*, 118 Mich. 87 (76 N. W. 161, 79 N. W. 911), and authorities there cited.

The meritorious question in the case is whether the defendant appellant is entitled to protection for the mortgage of $700, the amount he paid for Mr. Parker's half of the mortgage existing upon the premises at the time of the fraudulent transfers, and whether the foreclosure of the

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mortgage given by Zachariah Stringer and Edgar J. Osband to him, of $813.25 (being said $700 and interest thereon), is valid. The conclusion is irresistible that this entire transaction was fraudulent *ab initio*, and that Parker, defendant, and his brother entered into it with the sole view to not only hinder and delay, but to defraud, the creditors of Parker. In such cases the courts will leave parties to lie in the beds they have voluntarily made. "He that committeth iniquity shall not have equity."

While conveyances made in fraud of creditors are valid as between the parties themselves, they are absolutely void as to creditors, and as to them it is immaterial whether the grantee paid any consideration or not. If the purpose of both the grantor and the grantee is to defraud the grantor's creditors, the title to the land, as to creditors, is regarded in equity the same as though no conveyance had been made, and the title still stood in the grantor. The wise theory of the law is that a creditor, trusting the debtor upon the faith of his owning the land, is entitled to the first lien upon it, where the grantee has participated in the fraud of the grantor, the debtor. This is the long and well-established rule. *Sands* v. *Codwise*, 4 Johns. 536 (4 Am. Dec. 305); *Shand* v. *Hanley*, 71 N. Y. 319; *Davis* v. *Leopold*, 87 N. Y. 620; *Wiley, Banks & Co.* v. *Knight*, 27 Ala. 336; *Daisy Roller Mills* v. *Ward*, 6 N. Dak. 317 (70 N. W. 271). In this last case will be found a valuable discussion of the subject, and a citation of authorities.

But we are not without authority in this court. The question arose in the early case of *How* v. *Camp*, Walk. Ch. 427. In that case the grantee was allowed the benefit of taxes paid and improvements made by him after the conveyance, but he was held not entitled to the consideration paid for the deed. The reason of the rule undoubtedly is that taxes and improvements in good faith are for the benefit of the creditors, while the consideration paid with the intent to defraud is not. The distinction is drawn in that case between constructive and positive

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fraud, where the grantee is *particeps criminis*. See the language of the court on page 436. See, also, *Robinson* v. *Boyd*, 17 Mich. 128.

Prior liens paid in pursuance of such fraudulent agreements stand upon the same basis as actual payments for the purchase price. They are in fact a part of the purchase price. Authorities above cited; also Bump, Fraud. Conv. § 628.

This mortgage was voluntarily paid and discharged, and the mortgage to defendant Marshall given as a part of the fraudulent scheme.

We have examined the authorities cited by counsel for the defendant in support of their contention, and find that they have no application.

The decree is affirmed, with costs.

The other Justices concurred.

STEEL *v.* CLINTON CIRCUIT JUDGE.

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1. MANDAMUS—PLEA IN ABATEMENT—WAIVER.
   Mandamus will not lie to compel a circuit judge to reinstate a plea in abatement, stricken from the files on the ground that the right to maintain it had been waived, since the action of the court is reviewable on writ of error after final judgment, in case defendant shall see fit to stand upon his plea, and otherwise the point is waived.[1]

2. PLEADING—ABATEMENT—EFFECT OF MOTION TO STRIKE.
   An order striking a plea in abatement from the files has the same effect as if the judge had directed a jury to render a verdict for the plaintiff upon the trial of the issue raised by the plea.

Mandamus by George A. Steel to compel George P. Stone, circuit judge of Clinton county, to reinstate a plea

[1] See *Grand Rapids & Ind. R. Co.* v. *Charlevoix Circuit Judge*, *ante*, 122.

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in abatement. Submitted May 12, 1903. (Calendar No. 19,929.) Writ denied July 8, 1903.

H. E. & E. L. Walbridge, for relator.

Norton & Dooling, for respondent.

HOOKER, C. J. The defendant, relator herein, a resident of Detroit, was sued in an action of case in the county of Clinton by one John C. Hicks. The action was begun by summons December 30, 1899. The defendant caused his general appearance to be entered January 6, 1900. On February 24, 1902, the plaintiff's default for not filing a declaration was entered, and this order was set aside, upon a stipulation, on March 19, 1902. On March 22, 1902, a declaration was filed, and on March 25th a demand for a bill of particulars of plaintiff's claim was served. The declaration consisted of special counts, wherein the plaintiff's causes of action were set forth at great length.

On October 7, 1902, the defendant filed a plea in abatement, in which he claimed that the plaintiff was not the owner of the alleged causes of action, but that they belonged to a bank located in Gratiot county, and that they were transferred to the plaintiff for the sole and only purpose of enabling the bank to litigate its claim through and in the name of the plaintiff, but for its sole benefit, by acquiring jurisdiction of said defendant in Clinton county, and thereby avoiding a suit against him at his residence in Detroit.

On November 13, 1902, the plaintiff served his bill of particulars, and on November 15, 1902, a motion was made to strike the plea in abatement from the files, upon the ground that the right to maintain such a plea was waived (1) by the entry and service of defendant's appearance; (2) by filing an affidavit and entering plaintiff's default, and subsequently making a stipulation to vacate the same; (3) by demanding a bill of particulars; (4) by reason of his delay, especially as defendant at all times knew the nature of plaintiff's claim; (5) because the plea was not

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filed within the time prescribed by rule; (6) because the plea is not signed by counsel. This motion was granted. Thereupon, upon application to this court, an order was issued to the circuit judge directing that he show cause why a peremptory *mandamus* should not issue, requiring him to reinstate such plea.

The question raised by defendant's plea is, Did the court acquire jurisdiction over the person of the defendant? The court has seen fit to dispose of this question by holding that it did, and, although the subject was disposed of upon a motion to strike the plea from the files, the result and order are in no essential respects different from what they would have been had the judge directed a jury to render a verdict for the plaintiff upon a trial of the issue raised by such plea. He has "proceeded and determined" that issue, and it is not proper practice to compel him by *mandamus* to do it again because we may think he erred in his conclusions. As well might we issue a *mandamus* to correct any other error in disposing of such issue.

It should not be forgotten that this is a dilatory plea, and the order interlocutory. It is not the policy of the law to interrupt proceedings, and postpone a hearing of the merits of a case, to enable parties to review, and possibly correct, the proceedings of the trial court at successive stages. It was the practice of the common law never to review an action at law until it reached a final judgment, and that has been the practice adopted in this State; and especially is it so in relation to dilatory pleas, which are not favored.

One who demurs to a declaration must let the case go to a final judgment before he can complain of error in such order. If he pleads, he waives the question. The same is true of pleas in abatement. He must be content to stand upon his plea, and review the adverse judgment on error, or the point will be waived.

In *Thompson* v. *Benefit Ass'n*, 52 Mich. 524 (18 N. W. 247), one was held to have waived a jurisdictional question by appearing and filing a demurrer; citing several cases from other States. See, also, *Norberg* v. *Heineman*, 59 Mich. 210 (26 N. W. 481).

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"And the fact that a defendant had previously moved to dismiss the case does not render a general appearance any the less effectual to confer jurisdiction. *Manhard* v. *Schott*, 37 Mich. 234. When a defendant appears and objects to the jurisdiction, and his objection is overruled, he must then elect either to stand upon his objections or to go into the merits." MONTGOMERY, J., in *Stevens* v. *Harris*, 99 Mich. 233 (58 N. W. 230).

In the case of *Michigan Mut. Fire-Ins. Co.* v. *Wayne Circuit Judge*, 112 Mich. 272 (70 N. W. 582), MOORE, J., with the approval of the entire bench, after calling attention to the fact that there was a want of consistency in the opinions, declared the rule to be:

"The writ will be entertained when the court has refused to retain jurisdiction, supposing it had no jurisdiction when it had jurisdiction in fact, because, if the writ was not entertained under such circumstances, the party would be without remedy. On the contrary, if the court claims jurisdiction in a case where it is not entitled to exercise it, such action of the court can be reviewed by appeal or writ of error. In such a case the writ of *mandamus* ought not to issue. Applying these general principles to the case now here, we do not regard it as a case where the writ should issue. If the court is wrong in asserting jurisdiction, the aggrieved party has a remedy by writ of error."

In *Watkins* v. *Plummer*, 93 Mich. 217 (53 N. W. 165), one sued on a note pleaded the general issue, and it was said to be a waiver of jurisdictional questions. The court said: "It was known to defendant that the action was not necessarily brought in the name of the real owner."

In *Griffin* v. *Wattles*, 119 Mich. 346 (78 N. W. 122), it was said:

"It is a rule of the common law that rulings upon dilatory pleas cannot be reviewed when the defendant has subsequently pleaded to the merits, as the right to review is thereby waived. Under that practice, a plea in abatement must precede the plea to the merits. * * * We have seen that the common law, with a view to the same end, prohibits a defendant from putting his adversary to the expense of a trial of the merits, if he would test the

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correctness of proceedings upon dilatory pleas. To review such questions, he must incur the hazard of a judgment against him. This court has steadily adhered to this practice, although frequently importuned to so change the rules as to permit the course which the common law condemns. The statute, like the common law, looks upon a speedy trial of the merits as a desirable result; and a practice which delays, by permitting technical and dilatory tactics, is contrary to the policy of both, and we cannot give an unnecessary construction to Rule 6 which would have that effect."

See, also, *Reed* v. *St. Clair Circuit Judge*, 122 Mich. 156 (80 N. W. 985); *Ambos* v. *Ingham Circuit Judge*, 123 Mich. 618 (82 N. W. 267); *City of Detroit* v. *Wayne Circuit Judge*, 125 Mich. 634 (85 N. W. 1).

The rule extends to criminal cases (see *Maynard* v. *Ingham Circuit Judge*, 124 Mich. 465 [83 N. W. 102]; *Hosford* v. *Gratiot Circuit Judge*, 129 Mich. 302 [88 N. W. 627]), and to garnishment (see *Freud* v. *Saginaw Circuit Judge*, 125 Mich. 670 [85 N. W. 193]). See, also, *National Fraternity* v. *Wayne Circuit Judge*, 127 Mich. 186 (86 N. W. 540); *Fisher* v. *Wayne Circuit Judge*, 128 Mich. 543 (87 N. W. 792); *Poupard* v. *Judge of Recorder's Court*, 129 Mich. 662 (89 N. W. 577); *Welling* v. *Antrim Circuit Judge*, McGrath, Mand. Cas. 95; *Rosen* v. *Wayne Circuit Judge*, Id. 96; *Rosenberg* v. *Clinton Circuit Judge*, Id. 97; *Taylor* v. *St. Clair Circuit Judge*, 32 Mich. 95; *Snyder* v. *Lapeer Circuit Judge*, McGrath, Mand. Cas. 220; *Willson* v. *Gratiot Circuit Judge*, 104 Mich. 155 (62 N. W. 293); *Bailey* v. *Calhoun Circuit Judge*, McGrath, Mand. Cas. 260; *Harris* v. *Muskegon Circuit Judge*, Id. 261; *Smith* v. *Wayne Circuit Judge*, 84 Mich. 564 (47 N. W. 1092); *Coot* v. *Ionia Probate Judge*, 93 Mich. 304 (53 N. W. 395); *McBride* v. *Common Council of Grand Rapids*, 32 Mich. 360; *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417 (72 N. W. 249).

The writ is denied, with costs.

The other Justices concurred.

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FIRST NATIONAL BANK OF HANCOCK *v.* JOHNSON.

1. BILLS AND NOTES—NOTE PAYABLE TO BANK CASHIER—INDORSEMENT—ACTION.
   Suit may be brought by a bank upon a promissory note payable to the order of its cashier, though not indorsed by him, where the evidence shows that he acted in the transaction for the bank.

2. SAME—PAROL EVIDENCE—LIABILITY OF SURETY.
   The liability of a surety on a promissory note is not affected by a showing that the payee told him that one of the principals was worth a certain sum of money, and that he took no risk in signing the note; there being no evidence to show that the principal was not worth the sum stated.

3. SAME—CONSIDERATION.
   A consideration passing to the principal of a promissory note is sufficient to support the promise of the surety.

4. SAME—RENEWAL NOTE—INSOLVENCY OF PRINCIPAL—RELEASE OF SURETY.
   The liability of a surety on a renewal note, who also signed the original note, is not affected by the payee's failure to inform him that one of the principals had lost her property since the making of the first note.

Error to Houghton; Streeter, J. Submitted June 3, 1903. (Docket No. 21.) Decided July 8, 1903.

Assumpsit by the First National Bank of Hancock against Andrew Johnson on a promissory note. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

W. A. Burritt, for appellant.

Hanchette & Lawton, for appellee.

CARPENTER, J. This suit was brought to recover the amount of a note, upon which defendant was an accommodation maker. The court below directed a verdict for

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the plaintiff. Defendant seeks a reversal on several grounds.

1. The note was payable "to the order of William Condon, cashier, at First National Bank, Hancock, Michigan." It was never indorsed by Condon, though the evidence showed him to be plaintiff's cashier, and that he acted in the transaction for the plaintiff. It is insisted that, under these circumstances, suit could not be maintained in plaintiff's name. This objection is fully answered by *Garton* v. *Union City Nat. Bank*, 34 Mich. 279.

2. Defendant, legally speaking, was a surety on this note. The principals were Allen Kirkpatrick and his wife, Mrs. E. A. Kirkpatrick. He offered testimony tending to prove that, when he signed the note for which the note in suit was given as a renewal, plaintiff's cashier informed him that Mrs. E. A. Kirkpatrick owned property to the value of $10,000, and that he "took no risk" in signing it. Defendant contends that this evidence, together with other evidence offered by him, made a case for the consideration of the jury, and that the court therefore erred in directing a verdict. It is a sufficient answer to this claim to say that there was no evidence, either introduced or offered, tending to show that Mrs. Kirkpatrick was not worth $10,000 at the time the original note was executed, and that the statement that defendant "took no risk" in signing the note had no effect upon the obligation he incurred by signing it. *Adair* v. *Adair*, 5 Mich. 204 (71 Am. Dec. 779); *Hyde* v. *Tenwinkel*, 26 Mich. 93; *Phelps* v. *Abbott*, 114 Mich. 88 (72 N. W. 3); *Mason & Hamlin Co.* v. *Gage*, 119 Mich. 361 (78 N. W. 130).

3. Nor can we agree with defendant that there was any want or failure of consideration. It is proved that, at the time the first note was signed, the money secured thereby was advanced to the Kirkpatricks. No authority need be cited to the proposition that this constituted a legal and sufficient consideration for defendant's promise.

4. Defendant's counsel contends, as we infer from his

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brief, that it was the duty of the plaintiff's cashier, when the renewals were signed, to inform defendant of his knowledge of Mrs. Kirkpatrick's changed financial condition (she had, as defendant claims, lost her property), and that the failure to do so was evidence of fraud. The notice attached to defendant's plea did not apprise plaintiff of any such theory, nor do we think the theory sound under any notice. It is sufficiently answered by saying that defendant was under a legal obligation to pay the original note, and he was in no way damnified when he satisfied that obligation by giving another of the same character.

We discover no error in the record, and the judgment of the court below is therefore affirmed.

The other Justices concurred.

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ABANDONMENT—See PLEADING (3); SALE (12–17).

ABATEMENT—See MANDAMUS (1, 3); PRACTICE IN CIRCUIT COURT.

ACCIDENT INSURANCE.

Evidence in an action on an accident policy examined, and *held* to raise a question for the jury as to whether insured came to his death through homicide or suicide. *Furbush* v. *Maryland Casualty Co.*, 479.

See TRIAL (14).

ACCOUNTING.

A decree on an accounting was affirmed, under the evidence. *George Collin Co.* v. *McLeod*, 623.

See EQUITY JURISDICTION (2); TENANCY IN COMMON (1, 2).

ACCRETIONS—See ADVERSE POSSESSION (2).

ACTIONS.

The assignment of a claim as security does not prevent an action thereon in the name of the assignor with the knowledge and acquiescence of the assignee, the judgment being conclusive on the assignee. *Lamson* v. *City of Marshall*, 250.

See BILLS AND NOTES (4); BUILDING AND LOAN ASSOCIATIONS (4); MUNICIPAL CORPORATIONS (6, 7, 9, 13); TAXATION (6, 10, 11); TROVER.

ADMISSIONS—See CORPORATIONS (2); CRIMINAL LAW (2, 3).

ADVERSE POSSESSION.

1. Where, in ejectment for part of an island in an inland river, it appeared that, for more than 20 years before suit, defendant and its grantors had been in the actual occupancy of portions of the island, and had had the exclusive use of the remainder for such purposes as occasion required,—*i. e.*, for fishing, grazing, recreation, the taking of ice, the holding of public exhibitions, and the disposition of garbage,—claiming to own the entire island, defendant's title was established by adverse possession, though, as to the land in controversy, its paper title interlocked with the earlier title of plaintiff, under which he was in possession of adjacent territory. *McKee* v. *City of Grand Rapids*, 272.

2. As between one claiming an island in an inland river by adverse possession under color of title, and the owner of the adjacent mainland, accretions to the island made by dredging

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ADVERSE POSSESSION—Continued.

within a period of 15 years before suit belong to the owner of the island up to the original thread of the channel, and beyond that to the owner of the mainland. *Id.*

See TAXATION (17-23, 25).

AGENCY—See PRINCIPAL AND AGENT.

AMENDMENTS.

1. Where a justice's return on appeal stated merely that "plaintiff declared verbally," without reciting the substance of the declaration, but accompanying such return was a statement by the county treasurer of uncollected personal taxes, among which was a charge against defendant, and a plea of the general issue was interposed, plaintiff was properly permitted to amend the declaration by setting up a claim to recover such taxes. *Township of Ovid* v. *Haire*, 353.

2. It was not error to permit a surety on a bond, on the trial of an action thereon, to amend his plea by setting up that he signed the bond on condition that another should also sign it, which condition was not complied with; plaintiff having been given the option of a continuance, and having elected to proceed to trial. *People, for Use of National Sewer-Pipe Co.*, v. *Sharp*, 378.

3. A petition for the probate of a lost will may be amended in the circuit court on appeal by setting up the contents of the alleged will, the case having been fully tried in the court below. *Ewing* v. *McIntyre*, 459.

See JUSTICES OF THE PEACE (3).

APPEAL AND ERROR.

1. A contention that the contents of a lost execution were not sufficiently proved will not be sustained on appeal, where there was proof of a valid judgment, and the issue and levy of an execution thereunder, and the only objection to the testimony was that it was "incompetent and immaterial." *Crane* v. *Waldron*, 73.

2. In case of a discrepancy between the original and the printed record on appeal, the former will control. *Fitch* v. *Board of Auditors of Claims Against Manitou County*, 178.

3. A decree which is as favorable to appellant as he had a right to ask will not be reversed because a wrong reason was given by the court for the conclusion reached. *Wolcott* v. *Tweddle*, 389.

4. A party who took no exception to a remark made by the trial court on overruling an objection to testimony interposed by the opposite party could not complain of the remark on appeal. *Furbush* v. *Maryland Casualty Co.*, 479.

5. On an appeal from a conviction for assault with intent to ravish, in which the record contains only the testimony of the prosecutrix, an objection that the verdict is against the weight of the evidence cannot be considered. *People* v. *Toutant*, 520.

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APPEAL AND ERROR—Continued.

See AMENDMENTS (1, 3); CONSTITUTIONAL LAW (3); COSTS; DOWER (2); EJECTMENT (3, 4); FRAUDULENT CONVEYANCES (4); JUSTICES OF THE PEACE (2, 3); MANDAMUS; PROBATE COURTS (2); RAILROADS (6, 8, 10); TRIAL (5, 8, 13, 14, 16).

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ASSUMPTION OF RISK—See MASTER AND SERVANT (2, 3, 6, 15); RAILROADS (22).

ATTORNEY AND CLIENT—See WITNESSES (3).

ATTORNEY'S FEES—See RAILROADS (10).

BAILMENTS.

The liability of a bailee is established *prima facie* by proof of his receipt of the property, and failure to return it on demand; he then having the burden of showing his freedom from negligence. *Baehr* v. *Downey*, 164.

See INNKEEPERS (3); MASTER AND SERVANT (12).

BANKRUPTCY—See BONA FIDE PURCHASERS.

BANKS AND BANKING.

1. Money paid to a bank for a letter of credit issued by it for and in the name of another bank under the former's agreement of indemnity, the money being placed with the other funds of the bank, and, for convenience, entered on its books to the credit of the purchaser, but in such way as to prevent its withdrawal otherwise than by draft against the letter, does not constitute a trust fund for the benefit of the bank liable on and honoring the drafts drawn against such letter, so as to entitle it to preference over the general creditors of the other bank on the latter's insolvency. *Kuehne* v. *Union Trust Co.*, 602.

2. A person gave his note to a bank for money borrowed to put into a firm which was about to be organized. The cashier was told that the money was to be used to buy goods for the new firm, that the receipts from the sale of the goods would be deposited with the bank, and that, when the note should

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BANKS AND BANKING—Continued.

fall due, it would be paid from this deposit. *Held*, that this did not make the firm liable for the loan, so as to entitle it to have the amount thereof deducted from its balance on deposit with the bank at the time of its suspension. *Kroll* v. *Union Trust Co.*, 638.

See BILLS AND NOTES (4); CHECKS.

BASTARDY.

In a prosecution for bastardy, evidence of acts of intercourse other than that set up in the complaint is admissible as bearing upon the probable commission of the act alleged. *People* v. *Dupounce*, 1.

BENEFIT SOCIETIES.

1. The beneficiary named in a mutual benefit certificate has such an interest therein that he may, after the death of the insured, contest the validity of the latter's action in surrendering the certificate, and procuring a new one, payable to a different beneficiary, on the ground that he was mentally incompetent to bring about that result; and, if such claim be established, the original certificate will be held to have remained in force. *Grand Lodge A. O. U. W.* v. *Frank*, 232.

2. A member of a beneficiary association made a claim for sick benefits, and an agent of the association took up the certificate, and paid the member a certain sum in settlement of all claims by reason of the illness. The member never returned such amount, but subsequently sued for further benefits on the ground that the adjustment was made by reason of false and fraudulent statements to the effect that defendant had the right to take up the certificate. It appeared that, after the settlement, the association wrote plaintiff that the certificate was taken up by mistake, and the same was reissued, and premiums accepted. *Held*, that such conduct on the part of the company did not amount to a waiver of its right to insist on a return of the amount paid as a condition precedent to the rescission of the settlement by plaintiff. *Slater* v. *United States Health & Accident Ins. Co.*, 347.

3. The fact that the beneficiary named in a mutual benefit certificate is in possession thereof, and has paid the assessments and dues thereon, does not entitle her to object to the designation of a new beneficiary by the insured, pursuant to a by-law authorizing him to change his beneficiary at will, particularly where the payments are thereafter kept up by the new beneficiary. *Grand Lodge A. O. U. W.* v. *McGrath*, 626.

4. A beneficiary in a mutual benefit certificate has such an interest therein that she may contest the mental capacity of the insured to designate a new beneficiary, in accordance with the by-laws of the association. *Id.* 627.

BILLS AND NOTES.

1. Payment of a note by the maker after notice that the instrument has been lost, though the note be payable to bearer,

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BILLS AND NOTES—Continued.

does not extinguish the liability thereon, unless the person presenting it for payment be required, before payment, to prove his title thereto. *Page Woven Wire Fence Co.* v. *Pool*, 323.

2. The maker of a note was notified by the payee that it had been sent to a bank for collection. She called at the bank, where the cashier told her that it had not been received, and had probably been lost in transit. He nevertheless requested her to pay it, which she declined to do without its production. She subsequently claimed to have paid the note to one representing himself to be the agent of the payee. On the trial of an action on the note it was produced by the maker, at which time it bore the indorsement, "Pay to the order of any bank for collection and remittance" to the payee. *Held*, that the presumption of an authorized payment of the note, arising from its possession by the maker, was overcome, rendering it incumbent upon her to prove a payment under such circumstances as would discharge her from liability. *Id.*

3. The mere indorsement of a note to a bank for collection does not prevent the payee or his agent from demanding and receiving payment thereof. *Id.* 324.

4. Suit may be brought by a bank upon a promissory note payable to the order of its cashier, though not indorsed by him, where the evidence shows that he acted in the transaction for the bank. *First Nat. Bank of Hancock* v. *Johnson*, 700.

5. The liability of a surety on a promissory note is not affected by a showing that the payee told him that one of the principals was worth a certain sum of money, and that he took no risk in signing the note; there being no evidence to show that the principal was not worth the sum stated. *Id.*

6. A consideration passing to the principal of a promissory note is sufficient to support the promise of the surety. *Id.*

7. The liability of a surety on a renewal note, who also signed the original note, is not affected by the payee's failure to inform him that one of the principals had lost her property since the making of the first note. *Id.*

See CONSIDERATION; LIFE INSURANCE (9); SALE (10).

BILLS IN AID OF EXECUTION—See CONSTITUTIONAL LAW (1, 2); EXECUTION (1); JUDGMENTS (3).

BILLS OF LADING—See CARRIERS (5–7, 10, 11).

BILLS OF REVIEW—See BUILDING AND LOAN ASSOCIATIONS (2); EQUITY PLEADING.

BOARD OF ASSESSORS (STATE)—See TAXATION (1).

BOARDS OF HEALTH—See PUBLIC HEALTH.

BOARDS OF SUPERVISORS—See PUBLIC HEALTH.

BOILER EXPLOSIONS—See MASTER AND SERVANT (10, 11).

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BONA FIDE PURCHASERS.

A purchaser of corporate stock at bankruptcy sale, who took with notice that such stock had been given by the bankrupt to his daughter, and that the latter's subsequent indorsement and return of the certificate thereof to her father was to enable it to be pledged for corporate debts, could not hold the stock as against the daughter. *Goodwin* v. *Hampton Transportation Co.*, 229.

See MORTGAGES (3); RECEIVERS (3).

BONDS—See PRINCIPAL AND SURETY (2-4); PROBATE COURTS (2).

BOUNDARIES.

1. In ejectment, involving the true boundary line between plaintiff's and defendant's lands, situated, respectively, to the south and north of the east and west quarter line of the section, both parcels being bounded on the west by the north and south quarter line, the question as to the exact location of the latter line was immaterial. *Pugh* v. *Schindler*, 314.

2. A statement by the court in such action, that "it will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, *without some proof* of its being a true line, located and fixed by the government survey," was not misleading, where the court had already charged that plaintiff's claim could only be established by a preponderance of the evidence. *Id.*

3. A request to charge that a crooked fence of long standing, dividing the respective parcels, was better evidence of the boundary line between them than a recent survey, was properly refused, especially where there were traditions and alleged agreements on the assumption that it was not the boundary line, and where, moreover, counsel themselves stated that there never was a government line run, but that the practice was only to fix and establish quarter posts on the outside and at the center of sections. *Id.*

BREACH OF CONTRACT—See EQUITY JURISDICTION (3-5).

BUILDING AND LOAN ASSOCIATIONS.

1. A by-law of a building and loan association fixing a minimum premium is not prejudicial to a borrower, where his loan is made at an advance after competitive bidding. *Dailey* v. *Saginaw Bldg. & Loan Ass'n*, 403.

2. Where, subsequent to a foreclosure decree in favor of a building and loan association, the borrower claimed that he had not been credited with certain payments, and the association returned to him a part of the amount claimed, taking his receipt in full of all claims of every kind against the association, he could not afterwards maintain a bill to review the decree upon the ground that he was entitled to credit for further payments, and for certain fines which had been unlawfully imposed. *Id.*

3. Where a loan made by a foreign building and loan association is secured by mortgage on property in Michigan, and pay-

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BUILDING AND LOAN ASSOCIATIONS—Continued.

ments are made to a local agent therein, in accordance with the original understanding of the parties, the contract is a Michigan contract, and within our usury laws. *Hoskins* v. *Rochester Sav. & Loan Ass'n*, 505.

4. By the express terms of 2 Comp. Laws, § 7594, a contract made by a foreign building and loan association, which has not complied with the statutory prerequisites to its right to do business in this State, is void, and no action can be maintained thereon. *Id.*

5. A payment to a local agent of a foreign building and loan association is a payment to the association, notwithstanding a provision of its by-laws that he shall be deemed the agent of the member. *Id.*

See WITNESSES (7).

BUILDING RESTRICTIONS—See DEEDS (2–4).

BURDEN OF PROOF—See BAILMENTS; BILLS AND NOTES (2); BOUNDARIES (2); DEEDS (9); FIRE INSURANCE (2); LIFE INSURANCE (8); MASTER AND SERVANT (4); MUNICIPAL CORPORATIONS (17).

BURGLARY.

1. In a prosecution for burglary, evidence reviewed, and *held* sufficient to sustain a finding that respondent aided and abetted in the commission of the offense charged. *People* v. *McDonald*, 366.

2. Where three men were arrested for the same burglary, it was competent, on the trial of one of them, to show what property was found on the persons of all three. *People* v. *Wilson*, 517.

3. One who breaks and enters the barn of another in the night-time, with intent to commit the crime of larceny, may be convicted of the burglary of such person's dwelling house,—both buildings being in the same inclosure,—notwithstanding Act No. 34, Pub. Acts 1899, prescribing a punishment for entering any barn or other outbuilding in the night-time, with intent to commit a felony or larceny. *People* v. *Griffith*, 607.

BY-LAWS—See BENEFIT SOCIETIES (3, 4); BUILDING AND LOAN ASSOCIATIONS (1, 5).

CARRIERS.

1. Where a consignee of goods shipped by rail receipted for them on their arrival at their destination, removed a part of them, and himself placed the remainder in one of the railroad company's buildings, although he could have removed them also, the railroad company was not liable for the goods on their destruction by fire, without its fault, on the afternoon of the following day. *Stapleton* v. *Grand Trunk R. Co.*, 187.

2. When a consignor of goods delivers them to the railroad company, relinquishing all control over them, the company

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CARRIERS—Continued.

becomes immediately liable as a common carrier; but if the goods are merely placed in the company's depot for the consignor's convenience, and are not ready for shipment until he has done something further to them, the company is not so liable. *Id.*

3. Where a shipper of live stock agreed with the company's agent at the point of destination that, on the arrival of the car, it should be placed at a cattle-chute to permit him to unload, and the car was so placed, and detached from the train by the brakeman, who told the shipper it was "all right," it was a question for the jury whether the shipper, who was injured by the backing of the train against the car while he was unloading it, had a right to assume that the car had been delivered to him. *Brown* v. *Pontiac, etc., R. Co.*, 371.

4. Irrespective of such prior agreement, and though there was no showing of any formal action by the conductor, it was for the jury to say whether a delivery of the car was not intended; it appearing that there was no other place at which the stock could be unloaded. *Id.*

5. Where a carrier gave a bill of lading for a car of perishable fruit consigned to a point in another State beyond its own line, specifying the route to destination, and reciting that the property was received subject to the carrier's liability under the common law and statutes in force in the various States through which the goods might pass, and that the car was to be iced at G., and re-iced as often as necessary, the carrier issuing such bill was liable for damage to the fruit caused by a failure to keep the car properly iced, whether the default was its own or that of a connecting carrier. *Johnson* v. *Toledo, etc., R. Co.*, 596.

6. Where, in an action against a carrier for injuries to fruit shipped under a contract requiring that the cars should be properly iced when delivered, there was some evidence that the cars furnished were inadequately iced, and that they were delayed in transit before delivery to a connecting carrier, whether the injury occurred while the cars were on defendant's line was a question for the jury. *Id.*

7. Where a bill of lading for the shipment of fruit provided that the cars should be iced at G., and re-iced as often as necessary thereafter, the fact that the shipper discovered that the cars were insufficiently iced before their departure did not impose a responsibility upon him or relieve the carrier, if the shipper had no opportunity to remedy the situation, and believed that the fruit would reach G. without injury. *Id.* 597.

8. In an action against a railroad company by a shipper for damages arising out of defendant's alleged failure to transport and deliver with reasonable dispatch a car load of hogs, and to water them externally while in transit, by reason of which neglect a number of them died, plaintiff's witnesses testified that the car was dry the morning after its arrival, and that, if the hogs had been properly showered the day before, it would have presented a different appearance. There was

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CARRIERS—Continued.

also evidence that for at least two hours the car was left on a side track after a long journey, when it was possible to deliver the hogs promptly to a connecting road. *Held*, sufficient to go to the jury on the question of defendant's negligence in the respects alleged. *Wallace* v. *Lake Shore, etc., R. Co.*, 638.

9. It appearing that the delay while the car was in charge of defendant was during the most trying time of day, the jury might infer that defendant was responsible for the injury, rather than a connecting carrier to which the car was delivered. *Id.* 634.

10. The bill of lading provided that plaintiff was, "at his own sole risk and expense, to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." Plaintiff did not accompany the stock, which fact was known to defendant's conductor. The testimony tended to show that an agent accompanying the hogs could do nothing in the way of drenching or showering them; and one of defendant's witnesses testified that it was considered the duty of the persons in charge of a stock train, in hot weather, to see that live hogs were showered when occasion required. The conductor testified that the men in charge of the train operated the appliances for showering, and it further appeared that defendant's superintendent had issued orders to drench all hogs. *Held*, that watering the hogs was a part of the actual duty of transportation, and that, as plaintiff's failure to accompany the car was not the occasion of the neglect of such duty, there was a case for the jury on the question of defendant's negligence. *Id.*

11. The bill of lading further provided that no claim for damages should be made unless filed within five days. Plaintiff's claim was filed one day late, but was returned to him to have the freight bill attached, which was done, whereupon defendant declined to settle, but not on the ground that the claim was filed too late. *Held*, a waiver of the provision as to time. *Id.*

12. Where, in an action by a passenger for being ejected from a train, it appears that he presented a ticket which, on its face, entitled him to ride, defendant cannot show that it was the custom to issue such tickets for certain days only, and that published notice had been given accordingly, in the absence of any proof of knowledge of such limitation by the passenger or the purchaser of the ticket. *Carvey* v. *Detroit, etc., R. Co.*, 659.

CERTIFICATES OF ERROR—See TAXATION (16).

CERTIORARI—See TOWNSHIPS.

CHALLENGES—See CRIMINAL LAW (15).

CHANGE OF BENEFICIARY—See BENEFIT SOCIETIES (1, 3, 4).

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CHATTEL MORTGAGES—See SALE (10).

CHECKS.

1. The holding of the circuit judge, to the effect that a check payable to "the order of ————," a line being drawn through the space provided for the name of the payee, is not payable to bearer, or to an impersonal payee, but is void for want of a payee, precluding the bank from charging the drawer with the amount paid thereon, was sustained by a divided court; CARPENTER and GRANT, JJ., being of the contrary opinion, and MONTGOMERY, J., not sitting. *Gordon* v. *Lansing State Sav. Bank*, 143.

2. A date is not essential to the validity of a check. Per CARPENTER and GRANT, JJ. *Id.*

CIRCUMSTANTIAL EVIDENCE—See CRIMINAL LAW (6).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

CLAIMS—See CONSTITUTIONAL LAW (4-7); ESTATES OF DECEDENTS (2); MUNICIPAL CORPORATIONS (6, 7); PROBATE COURTS (2); PUBLIC HEALTH.

CLERK'S CERTIFICATE—See EQUITY JURISDICTION (1).

COLLATERAL ATTACK—See JUDGMENTS (2, 3); RECEIVERS (1).

COLLATERAL SECURITY—See ACTIONS.

COMMERCIAL PAPER—See BILLS AND NOTES.

COMMON CARRIERS—See CARRIERS.

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN.

CONDITIONS—See DEEDS (2-4, 12); FIRE INSURANCE (2, 4).

CONDONATION—See DIVORCE (1).

CONDUCT OF COUNSEL—See CRIMINAL LAW (10-12); TRIAL (9, 10, 17).

CONFIDENTIAL COMMUNICATIONS—See WITNESSES (3).

CONFLICT OF LAWS—See BUILDING AND LOAN ASSOCIATIONS (3).

CONSIDERATION.

A contract void as against public policy furnishes no consideration for a promissory note. *Hubbard* v. *Freiberger*, 139.

See BILLS AND NOTES (5); FRAUDULENT CONVEYANCES (2, 5); INNKEEPERS (1); JUDGMENTS (1); JUSTICES OF THE PEACE (1); LIFE INSURANCE (9); SALE (10).

CONSPIRACY—See CRIMINAL LAW (4).

CONSTITUTIONAL LAW.

1. Act No. 99, Pub. Acts 1897 (3 Comp. Laws, § 10203), providing that, in suits in aid of execution, complainant shall make a

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CONSTITUTIONAL LAW—Continued.

prima facie case by introducing in evidence the judgment against the principal defendant, the execution, with levy thereon indorsed, and proof of the conveyance complained of, prescribes a mere rule of evidence, and is not violative of the constitutional guaranty of "due process of law." *Crane* v. *Waldron*, 73.

2. The object of the act is sufficiently indicated by its title, viz., "An act to provide for the change of rules of evidence in cases where bills in aid of execution are filed." *Id.*

3. Where the constitutionality of a law is attacked, objections and arguments against its validity may be urged on appeal, though not advanced in the court below. *Fitch* v. *Board of Auditors of Claims Against Manitou County*, 179.

4. Joint Resolution No. 4 of the legislature of 1901, creating a board to audit claims against the disorganized county of Manitou, with power to apportion the amount allowed against the territory formerly comprising the same, conferred judicial power on such board, in violation of article 6, § 1, of the Constitution, vesting the judicial power in the courts. *Id.*

5. The fact that, by the terms of the resolution, the action of the board was reviewable by *mandamus*, did not save its validity. *Id.*

6. Nor could it be sustained on the ground that it is a legitimate exercise of legislative power to determine what debts a municipality shall pay, and to compel their payment; as the Constitution, by article 4, § 31, prohibits the legislature from auditing accounts. *Id.*

7. Neither the fact that the courts have upheld the exercise of judicial power by circuit court commissioners and by commissioners on claims against the estates of decedents, nor the fact that claims are habitually audited by boards of supervisors and county auditors, as well as by various officers of townships, cities, and villages, is controlling of the present question. *Id.*

See EMINENT DOMAIN (1, 2, 4); PUBLIC OFFICERS; TAXATION (17, 18, 25).

CONTAGIOUS DISEASES—See PUBLIC HEALTH.

CONTRACTS.

1. An undertaking read substantially as follows: "Return this coupon to A., dealer in buggies, with $15, for which he will deliver to you a book of four of these coupons. Sell these for $3.75 each, thereby getting your $15 back. Each of those to whom you sell a coupon sends to me, purchasing a book for himself. When your four coupons have been sent in, I have received $60, and you will be entitled to $60 worth of merchandise at my store, and it costs you but $3.75 and a few hours' work selling the coupons. The right to redeem all coupons at any time is hereby reserved; and, in case of the exercise of such right, parties holding the same shall be allowed the full value on the purchase price of any article in

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CONTRACTS—Continued.

my establishment. Parties purchasing coupons and being unable to dispose of them will also be allowed face value, less amount paid for first coupon, on the purchase price of anything in my establishment. Coupons will not be redeemable in any other manner than as above specified." *Held*, against public policy. *Hubbard* v. *Freiberger*, 139.

2. Defendant being ill, his physician telephoned a hospital, and was told that room, board, nursing, and the attendance of a house physician could be had for $15 a week. Nothing was said about an operation. Defendant went to the hospital, where he was operated on and afterwards cared for by plaintiff, who was called by the house physician. In an action to recover for such services, *held*, that there was nothing to support a finding that they were covered by the contract referred to, and hence defendant was liable for their reasonable value. *Crumrine* v. *Austin*, 283.

3. Plaintiff testified that his charge was reasonable, but admitted the custom of physicians to regulate their fees in such cases by the financial standing of their patients; while defendant testified that plaintiff told him, when he presented his bill, that persons who hold political jobs must pay for cases where doctors work for nothing. *Held*, that the reasonable value of the services was a question for the jury. *Id.*

4. That there was a misunderstanding between the parties as to what was agreed to between them can be deduced only from the language used, not from the testimony of one that his understanding was different from the claim of the other. *Durgin* v. *Smith*, 331.

5. The construction of written correspondence between the parties to a suit is for the court. *Slater* v. *United States Health & Accident Ins. Co.*, 347.

6. Defendant, in an action for the balance of the contract price for certain work on a building, was not harmed by an instruction to the effect that there could be no recoupment unless the recovery should be on the *quantum meruit* alone, where the court further charged that plaintiff could not recover on the contract unless he had fully performed it and defendant had accepted the work, and also fairly submitted to the jury defendant's claim for damages for breach of an express warranty. *Mosaic Tile Co.* v. *Chiera*, 497.

7. One who has failed fully to perform his contract for certain work on a building may nevertheless recover under the *quantum meruit*, where the owner has appropriated so much as was done, subject to the latter's right of recoupment. *Id.*

8. Where the verdict shows that it was not rendered on the *quantum meruit*, it is immaterial that there was no proof of the value of the work. *Id.*

9. Defendants entered into a contract with a corporation, whereby the latter agreed to erect a stave factory at a certain place, to operate it as long as the timber supply might warrant, not to buy or pay for its timber through any one merchant, and not to own or be in any way connected with a

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CONTRACTS—Continued.

store or boarding house. Defendants were to furnish and lease free a site for the factory for the period of 10 years, to save the corporation harmless from all taxes assessed against the site, factory, and products during said period, and to deliver free, within a short time, a certain quantity of timber. In case the corporation should not operate its factory for 12 months, it was to pay all taxes assessed against its property during the time the factory was not in operation; and the lease was renewable at the option of the corporation, "its successors or assigns." *Held*, that the contract was assignable by the corporation. *Northwestern Cooperage & Lumber Co.* v. *Byers*, 534.

10. In an action for the breach of a contract for the sale of fruit, evidence that, after the execution of the contract, it was verbally agreed that defendant might ship in specified quantities, was admissible. *Town* v. *Jepson*, 674.

11. Where a contract for the sale of fruit provided for payment on "sight draft, with bill of lading attached," evidence of an oral agreement that the draft should be sent to a certain place was not objectionable as varying the terms of the contract. *Id.*

See BUILDING AND LOAN ASSOCIATIONS (3–5); CARRIERS (5–7, 10–12); CORPORATIONS (1); EQUITY JURISDICTION (3–5); FRAUD; INNKEEPERS; MARRIED WOMEN; MORTGAGES (2); MUNICIPAL CORPORATIONS (4, 9–19); PLEADING (2); PUBLIC HEALTH (1); SALE; SCHOOLS AND SCHOOL DISTRICTS (1–3); SPECIFIC PERFORMANCE; VENDOR AND PURCHASER (2).

CONTRIBUTORY NEGLIGENCE.

1. The fact that plaintiff, who was injured by falling over a board which had been thrown in the gutter during the rebuilding of a sidewalk, left the sidewalk line, in the darkness, some 15 feet from a cross-walk, and attempted to go thereto diagonally, with knowledge of the progressing repairs, did not conclusively show contributory negligence. *Finch* v. *Village of Bangor*, 149.

2. Where a pedestrian steps near a hole in a sidewalk, and, solely on account of its wet condition, her foot slips into the hole and she is injured, there is no contributory negligence. *Burrell* v. *City of Greenville*, 235.

3. In an action against a railroad company by a shipper for injuries received by the backing of a train against a car which he was unloading, where the testimony was conflicting as to whether he was in position to see the approaching train, the question of his contributory negligence was for the jury. *Brown* v. *Pontiac, etc., R. Co.*, 372.

4. One who was struck by the engine of a passenger train as he stepped upon the track at a crossing was guilty of contributory negligence, precluding a recovery for the injury, where, though the gates were not lowered nor the engine bell rung, he knew that the train had stopped at the depot near by, and

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CONTRIBUTORY NEGLIGENCE—Continued.

was likely to start at any moment, and in fact heard the noise of the engine, but, supposing it to come from another engine some distance away, hurried on to meet a friend, without looking to see whether the train was approaching. *Boutell* v. *Michigan Cent. R. Co.*, 486.

5. Whether plaintiff, who was injured by the giving way of a platform scale, was guilty of contributory negligence in overloading the scales, or in not properly distributing his load, was for the jury. *McIntyre* v. *Pfaudler Vacuum Fermentation Co.*, 552.

6. Where a railroad brakeman, in accordance with a custom of employés of the company, went in front of a car moving at from 4 to 5 miles an hour, on the main track, for the purpose of adjusting a coupling, and was run over and injured in consequence of stepping in a ditch constructed across the track, which was filled with snow, and of the existence of which he had no knowledge, the question of his contributory negligence was for the jury. *De Cair* v. *Manistee, etc., R. Co.*, 579.

7. Where, in an action for injuries caused by the fall of a rack used for the storage of lumber in the factory where plaintiff was employed, it appeared that he had no occasion to use or to examine the rack, and he testified that he supposed it was safe, it could not be said, as a matter of law, that he was guilty of contributory negligence. *Corbett* v. *American Screen Door Co.*, 669.

See INNKEEPERS (4); RAILROADS (21).

CORPORATIONS.

1. Even if a promise that a corporation which the promisors contemplate organizing shall perform certain undertakings is not binding on such corporation, it not being in existence at the time, this does not make the promisors personally liable. *Durgin* v. *Smith*, 331.

2. In an action for the price of a machine sold to a corporation, in which defendant claimed a breach of warranty as to the work the machine was capable of doing, admissions by a director of defendant corporation as to the manner in which the machine was operating, not made in connection with the performance of any duty devolving upon him, were not binding on the corporation, though it appeared that he was present, giving directions, at the installation of the machinery, and was authorized to make some arrangement as to settlement therefor. *Allington & Curtis Manfg. Co.* v. *Detroit Reduction Co.*, 428.

See BONA FIDE PURCHASERS; MANDAMUS (2); MUNICIPAL CORPORATIONS.

CORRESPONDENCE—See CONTRACTS (5).

COSTS.

An error in the printed record on appeal, justifying a motion to dismiss by the appellee, will impose costs of the motion on appellant. *Fitch* v. *Board of Auditors of Claims Against Manitou County*, 178.

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COUNSEL, CONDUCT OF—See CRIMINAL LAW (10–12); TRIAL (9, 10, 17).

COUNTIES—See PUBLIC HEALTH; PUBLIC OFFICERS.

COURTS—See PROBATE COURTS.

COVENANTS—See LANDLORD AND TENANT (1, 2, 4).

CREDIBILITY OF WITNESSES—See CRIMINAL LAW (5); WITNESSES (1, 5).

CRIMINAL LAW.

1. A respondent in a criminal case, who takes the stand in his own behalf, waives his constitutional privilege to the extent that he may be required to answer any questions material to the issue, though the answers to such questions tend to prove him guilty of some other crime than that for which he is on trial. *People* v. *Dupounce*, 1.

2. The fact that admissions by a respondent charged with rape were made in the presence of prosecutrix's father, who was excited, and made threats against respondent, does not necessarily require the exclusion of the admissions as made under duress. *People* v. *Rich*, 15.

3. An instruction that a person's admission of guilt is strong evidence against him, unless he was under such restraint that it could not be said to have been made voluntarily, and that it was for the jury to determine the purpose and motive of any admission of respondent, and whether it was true, taking into consideration his testimony as well as that of the other witnesses, sufficiently guarded respondent's rights. *Id.*

4. An instruction that respondent claimed that the prosecution was the result of a conspiracy,—"that is, there was no truth whatever in the charge,"—and that the evidence on that subject should be considered with the other evidence, but that respondent was not required to adopt any particular theory, being entitled to rest upon his plea of not guilty until the prosecution should convince the jury of his guilt, constituted a sufficient charge on such issue. *Id.*

5. An instruction that the rules governing evidence generally applied to the respondent as a witness in his own behalf, and that the jury were at liberty to give his evidence such weight as it was entitled to in view of all the facts in the case, taking into consideration his interest in the outcome, was not misleading. *Id.*

6. Where, in a prosecution for rape, the testimony of the complaining witness to the main fact was direct, the circumstantial evidence being corroborative merely, an instruction that it was not necessary that every fact and circumstance and every link in the chain be proved beyond a reasonable doubt, but that all the evidence in the case, when considered as a whole, must satisfy the jury beyond a reasonable doubt that respondent was guilty, was not erroneous *Id.*

7. A complaint alleging that defendant was found loitering about

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CRIMINAL LAW—Continued.

in common barrooms, and wandering about the streets, by day and by night, without any lawful means of support, and without being able to give a satisfactory account of himself, for a period of two weeks, in violation of a city ordinance relating to disorderly persons, did not purport to charge defendant with vagrancy, and was therefore not objectionable for failure to allege such offense. *In re Stegenga*, 55.

8. A complaint under Act No. 237, Pub. Acts 1899, for practicing medicine without having obtained the prescribed certificate of registration, is sufficient if stated in the language of the statute, and need not specify the particular acts or means by which respondent practiced such science. *White* v. *Lapeer Circuit Judge*, 93.

9. Where respondent, after being arrested, on being interrogated by the chief of police, denied having been in the vicinity where the offense was committed, and claimed a certain city as his residence, and, when shown a picture in a paper called "The Detective," at first denied, but afterwards admitted, that the picture was of himself, the picture was admissible to prove the falsity of the statements made by him as to his identity. *People* v. *McDonald*, 366.

10. It was not error to permit the prosecuting attorney, in a prosecution for burglary, to urge before the jury, from the testimony, that respondent was a "bad man," and "as bright a man of his kind as was ever before a jury,"—particularly where respondent's counsel had argued that there was no evidence that respondent was a bad man. *Id.*

11. Nor was it error for the prosecutor, in commenting on respondent's attitude after his arrest, to state that his position was that he was not bound to answer questions concerning himself, and that the position of an innocent man, when charged with crime, would be entirely different, and that he would lose no time in doing everything possible to convince the officers that he was innocent. *Id.*

12. In a prosecution for burglary, a picture of respondent, contained in a paper, which respondent at first denied but finally admitted was his, was introduced in evidence. Thereafter the prosecuting attorney, in referring to the picture in his argument, spoke of the contents of the paper. On objection the court ruled that it was improper to comment on any part of the paper except the photograph. *Held*, that, in view of the action of the trial judge, the error of the prosecutor in commenting on the paper was harmless. *Id.*

13. The voluntary statement of a witness on a criminal trial, that he had learned that the name under which respondent was being prosecuted was not his true name, is not ground for reversal, where, on further inquiry by the court, witness testified that he did not know respondent's true name. *People* v. *Wilson*, 518.

14. Though the statute (3 Comp. Laws, § 11885) contemplates that a grand jury will complete its work during the term to which it is summoned, yet, when it is continued into the next term,

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CRIMINAL LAW—Continued.

and is recognized by the court as a valid jury in receiving its indictments, it is a *de facto* grand jury, and its indictments are not void. *People* v. *Morgan*, 550.

15. An indictment of a *de facto* grand jury, not being void, cannot be set aside on motion to quash or by challenge to the array. 3 Comp. Laws, § 11882. *Id.*

See BASTARDY; BURGLARY; DISORDERLY PERSONS; LARCENY; RAPE; TRIAL (2–4); WITNESSES (3, 4).

CROSS-EXAMINATION—See TRIAL (1, 3); WITNESSES (5).

CROSSINGS (RAILROAD)—See CONTRIBUTORY NEGLIGENCE (4).

CRUELTY—See DIVORCE.

CUSTOM.

Testimony that the drillers in a stone quarry were accustomed to load holes for blasts has little tendency to prove such custom, where the witness admits on cross-examination that this was done only occasionally. *Kopf* v. *Monroe Stone Co.*, 287.

See CARRIERS (12); INNKEEPERS (1); RAILROADS (23).

DAMAGES—See EMINENT DOMAIN (6, 7); EQUITY JURISDICTION (4); FALSE IMPRISONMENT (3, 4); MUNICIPAL CORPORATIONS (14, 16); RAILROADS (4, 5, 8); SALE (9).

DANGEROUS PREMISES—See NEGLIGENCE (5).

DEBTOR AND CREDITOR—See BANKS AND BANKING; FRAUDULENT CONVEYANCES.

DEEDS.

1. Deceased conveyed certain land to his four sons, reserving a life estate, to save the property from being squandered through his intemperance. One of the sons afterwards died, leaving his father as his sole heir; and subsequently deceased conveyed the interest so inherited to F., his daughter-in-law, with whom he had lived for some time, and for whom he had great regard. The attorney who drew the deed testified that deceased was then of sound mind, and was not under the influence of liquor, and that he knew perfectly the character of his acts; that witness endeavored to dissuade him from his purpose, but that he persisted, and that the deed was executed and delivered to witness, to be held in escrow until decedent's death, and then to be delivered to F. *Held*, that the conveyance should be sustained. *Williams* v. *Williams*, 21.

2. A provision in a deed that nothing but a dwelling house shall be built on the premises conveyed excludes the erection of a photograph gallery. *Frink* v. *Hughes*, 63.

3. Such a provision, contained in a deed given by the proprietor of a plat, is enforceable in equity at the suit of another grantee from the same grantor, although other lots in the plat have been conveyed free from such restriction; it appearing that

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DEEDS—Continued.

the owners of the latter have thus far observed the restriction, so that there has been no departure from the general scheme. *Id.*

4. In such case, a provisión in the injunctive decree, giving defendant the right to apply for a modification as the conditions may change, sufficiently protects his rights. *Id.*

5. Where a deed is executed and recorded, but not delivered, and there is no intention on the part of the grantor that title shall pass, it does not do so. Such circumstances, therefore, do not constitute a breach of a condition of a fire policy against any "change of title or ownership" of the property insured. *Hogadone* v. *Grange Mut. Fire-Ins. Co.*, 339.

6. Upon an issue whether title had passed by plaintiff's deed to his wife, which he had caused to be recorded but had not actually delivered, he testified that the deed was made with intent to transfer the property, and that, when he placed it on record, he understood that he had transferred the property, and that the title was then in her; but he also testified that he did not intend to give her the property and release his claim to it, and that his only object was to get the record title out of his name, so as to ward off creditors. *Held*, to justify the court in refusing to find an intent to pass title. *Id.*

7. Where complainant, when about to be arrested for the murder of her husband, made an improvident conveyance of her interest in his estate to defendants, and thereafter, when out on bail, and with knowledge of all the circumstances, accepted the amount agreed to be paid her, less a liberal discount for anticipating the time of payment, she thereby affirmed the previous agreement, and could not maintain a bill to set aside the conveyance. *Sanderson* v. *Adams*, 359.

8. One has sufficient mental capacity to execute a valid deed if competent to understand the business in which he is engaged, to know the extent and value of his property, and how he wants to dispose of it, and to keep such facts in his mind long enough to plan and effect the conveyance without prompting or interference from others. *Hayman* v. *Wakeham*, 363.

9. In a suit to set aside a deed whereby the grantor, when 72 years of age, and in poor health, conveyed his property to his second wife, whom he had just married, to the exclusion of his children, the circumstances do not operate to shift the burden of proof as to mental capacity upon the defendant. *Id.*

10. Where a deed executed to an infant was retained by the grantor in his own possession and control until his death, with the exception of a brief interval, when it was handed to the father of the infant to be read, he being instructed at the time to have it recorded if anything should happen to the grantor, there was no delivery, and the deed was inoperative. *Bisard* v. *Sparks*, 587.

11. On a review of the evidence, the conclusion of the circuit judge as to the location of certain lands conveyed was sustained. *Hodgson* v. *Fisher*, 615.

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DEEDS—Continued.

12. Where a father conveyed land to his son on condition that the latter should support him during the remainder of his life, a quarrel between the father and son, which was provoked by the father, but in consequence of which he left the son's home, was *held* insufficient to work a forfeiture of the estate conveyed, but the son was required to pay the cost of the father's maintenance so long as he should choose to reside elsewhere. *Woolcott* v. *Woolcott*, 648.

See DOWER (1); MORTGAGES.

DELIVERY—See CARRIERS (2–4); DEEDS (5, 10).

DESCRIPTIONS—See DEEDS (11); EJECTMENT; RAILROADS (1).

DISORDERLY PERSONS.

It seems that one shown to have been loitering about the streets of a city and in barrooms in idleness for two weeks, without apparent habitation, and without any means of support, giving no satisfactory explanation of his conduct, would be punishable as a disorderly person at common law. *In re Stegenga*, 56.

See CRIMINAL LAW (7); MUNICIPAL CORPORATIONS (1, 2).

DIVORCE.

1. The fact that, after being cruelly treated, a wife continues to live with her husband for several years, in the hope of receiving proper treatment, in which she is disappointed, will not prevent her from relying on the original cruelty in a suit for divorce. *Creyts* v. *Creyts*, 4.

2. Evidence examined, and *held* to entitle a wife to a divorce on the ground of extreme cruelty. *Id.*

DOGS—See LARCENY.

DOMICILE—See TAXATION (4, 5, 8).

DOWER.

1. Where all of the heirs of a deceased landowner quitclaimed to the widow, who afterwards reconveyed to the heirs, reserving her dower right, *held*, that such right remained in the widow, an intention that it should not merge by the deed to her being presumed as in accordance with her interest. *Wettlaufer* v. *Ames*, 201.

2. While, under 3 Comp. Laws, § 11016, dower may be set off in an ordinary partition suit, the court's refusal to do so, on the ground that the right had become extinguished, can be complained of only by the claimant. *Id.*

DRAINS.

1. A landowner who, knowing that a drain is being constructed, for which he is liable to assessment, takes none of the statutory steps to determine the validity of the proceedings, cannot thereafter maintain a bill to restrain the collection of the

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DRAINS—Continued.

tax on the ground that the proceedings are invalid. *Wilson* v. *Woolman*, 350.

2. Under 2 Comp. Laws, § 4320, providing that, on the filing of an application for a drain, the commissioner shall examine the route of the proposed drain, and if, on survey, he shall find the drain to be practicable, he shall within 90 days make his first order of determination, the 90 days date from the survey, and not from the filing of the application. *Township of Flynn* v. *Woolman*, 508.

3. The fact that the record of the commissioner does not show when the minutes of the survey were delivered to him is not fatal to the jurisdiction, though more than 90 days elapsed between the filing of the application and the first order of determination, in view of the provision of 2 Comp. Laws, § 4364, that no drain tax shall be declared void by reason of any error or informality in the record of the proceedings. *Id.*

4. Where neither a township nor any of its taxpayers was assessed for the construction of a drain, it cannot complain of a failure to vacate such drain before constructing a second one over its route. *Id.*

5. 2 Comp. Laws, § 4383, requiring notice to be given in case a drain is vacated, has no application where a proposed drain merely taps an existing drain, leaving it to perform its office. *Id.* 509.

6. Under 2 Comp. Laws, § 4323, providing that notice of an application to the probate court for the appointment of commissioners in a drain proceeding shall be given to all persons whose lands are traversed by the drain who have not released the right of way, a township which is liable to assessment for the drain cannot complain because notice was not served on its supervisor. *Id.*

DUE PROCESS OF LAW—See TAXATION (17); CONSTITUTIONAL LAW (1).

DURESS—See CRIMINAL LAW (2, 3); DEEDS (7).

DYNAMITE—See MASTER AND SERVANT (6, 7).

EASEMENTS.

Where the owner of a lot entitled to an easement over an adjoining lot acquired the fee in the servient estate, and later, and while the easement was being used, deeded the two lots to different parties, the easement, which had been merged in the fee, was revived. *Wettlaufer* v. *Ames*, 201.

EJECTMENT.

1. 3 Comp. Laws, § 10973, provides that if any of the defendants in an action of ejectment, at the commencement of the suit, occupied or claimed distinct parcels in severalty or jointly, and other defendants possessed or claimed other parcels in severalty or jointly, all of which titles were derived from the same source, the jury shall state particularly in their verdict,

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EJECTMENT—Continued.

if in favor of plaintiff, the description of the parcel claimed by each defendant, but, if the titles are from different sources, plaintiff shall elect against which he will proceed. T. conveyed certain land to M., taking back a mortgage. M. deeded one-half of the land to W., and W. sold one-half of his interest to K., who entered into possession without receiving a deed. Plaintiff purchased the land at foreclosure sale, and brought ejectment against M. and K. In the meantime K. had purchased certain alleged outstanding titles to the entire premises, and quitclaimed to M. the parcel occupied by him. *Held*, that the titles of defendants were derived from the same source, and a recovery might be had against both. *Townsend* v. *Kreigh*, 243.

2. But in such case the verdict should particularly describe the parcel claimed by each. *Id.* 244.

3. Where the verdict was defective in this respect, but the proofs were clear, and there was no dispute as to the descriptions, plaintiff was permitted to avoid a reversal by consenting to a correction. *Id.*

4. An objection of a variance between the declaration and the verdict in ejectment in the description of the premises will not be considered on appeal, where not raised in the lower court or supported by an assignment of error. *Pugh* v. *Schindler*, 314.

See BOUNDARIES.

EMINENT DOMAIN.

1. It is beyond the power of the legislature to authorize the condemnation of land for the purpose of creating a water power which, when erected, may be used for public or private purposes at the option of the proprietor. So *held* where the corporation claiming such right was organized to sell and supply water and water power for mining, milling, manufacturing, domestic, municipal, and agricultural purposes, and to furnish people in the vicinity with electricity. *Berrien Springs Water-Power Co.* v. *Berrien Circuit Judge*, 48.

2. Land can be taken, under the power of eminent domain, for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved; but in such case the taking must be limited to the public necessity. *Id.*

3. The fact that the construction of a dam will result in improving the navigability of a stream does not establish the public necessity for taking lands that will be flooded as the result of such project, but the question of necessity must be determined by a jury, as in other cases. *Id.*

4. 2 Comp. Laws, § 6814, subd. 6, purporting to authorize corporations organized under the act of which it is a part to condemn land for the construction of a navigable waterway, with appurtenant water power, which may be used for private purposes, but containing nothing to indicate that the public necessity for the waterway shall limit the exercise of such right, is unconstitutional. *Id.* 49.

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EMINENT DOMAIN—Continued.

5. Where a petition in condemnation proceedings shows that petitioner has acquired the interest of the owner of a certain parcel, and a mortgagee of such parcel is made a party, the fact that the former owner is not also made a party does not deprive the court of jurisdiction. *Marquette, etc., R. Co.* v. *Longyear*, 94.

6. An award of damages by a jury in condemnation proceedings, if within the legitimate scope of the testimony, will not be disturbed on appeal. *Id.*

7. An instruction in proceedings to condemn land that the jury should pay the landowner what the land was worth, and no more, was not erroneous as excluding damages for anything on or under the land, as well as the damages resulting to the other land, where other instructions specifically stated that the value of the land was what it was worth, taking into consideration any injury that might be sustained to the land remaining. *Detroit, etc., R. Co.* v. *Hall*, 303.

See DRAINS (6); RAILROADS (1–10).

EQUITY JURISDICTION.

1. A petition under 3 Comp. Laws, § 9234 *et seq.*, authorizing the sale of lands on petition under oath of a devisee of a life estate therein, which is verified in a foreign State, and contains no clerk's certificate to the official character of the notary before whom the verification was made, is fatally defective. *Metcalfe* v. *Carr*, 123.

2. Equity has jurisdiction to restrain the grantee in a timber deed intended as a mortgage from cutting the timber, and to ascertain whether the mortgage has been paid; and, an accounting having shown a balance due to complainant, a decree may be entered for its payment. *Bigelow* v. *Thompson*, 334.

3. A bill in equity will not lie, at the suit of a schoolbook publisher, to enjoin a board of education from making a change of text-books in the public schools, in violation of an alleged contract with complainant, as there is an adequate remedy at law. *Attorney General, ex rel. Marr*, v. *Board of Education of Detroit*, 681.

4. Equity will not entertain a bill to restrain a breach of contract solely because of the uncertainty of the measure of damages in case of such breach. *Id.*

5. Nor, the contract covering a term of but three years, can a resort to equity be justified on the ground of preventing a multiplicity of suits, since that matter is entirely within the control of complainant. *Id.*

See DEEDS (8); DRAINS (1).

EQUITY PLEADING.

The fact that a settlement between a building and loan association and a borrower, had after foreclosure against both the borrower and his wife, was participated in by him alone, will

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EQUITY PLEADING—Continued.

not warrant reversing an adverse decree on a bill of review brought by both, where it was not relied on in the bill. *Dailey* v. *Saginaw Bldg. & Loan Ass'n*, 403.

See EQUITY JURISDICTION (1); SPECIFIC PERFORMANCE.

ERROR—See APPEAL AND ERROR.

ESTATES IN LAND—See EASEMENTS; EQUITY JURISDICTION (1); TENANCY IN COMMON.

ESTATES OF DECEDENTS.

1. In 1887, D. transferred his property to his wife to defeat the collection of a debt owing to complainant's intestate. Judgment was obtained in 1895, which was compromised soon thereafter, one C. assuming to act on behalf of the estate. Some two years afterwards complainant was appointed administrator (the estate being unrepresented in the meantime), and filed a bill to set aside the compromise as unauthorized. *Held*, that his right to maintain the suit could not be defeated on the ground of laches or estoppel, even though C., who negotiated the compromise, was the only creditor of the estate. *Upton* v. *Dennis*, 288.

2. Where a testator bequeathed to his wife his estate for life, and then to his children, accounts for medical services performed for the wife after the testator's death were not proper charges against his estate, though his executor received, during the lifetime of the wife, rents of the estate which belonged to her, and expended them for the use of the estate, but such accounts were debts due from the widow, collectible on her death from her estate. *Gray* v. *Seeley's Estate*, 319.

See DOWER; GIFTS; PRINCIPAL AND AGENT (2); WILLS; WITNESSES (6).

ESTOPPEL—See DRAINS (1); ESTATES OF DECEDENTS (1); LANDLORD AND TENANT (1); MUNICIPAL CORPORATIONS (11); SALE (11); TAXATION (13); VENDOR AND PURCHASER (1).

EVIDENCE.

1. A hypothetical question detailing the method adopted to remodel and improve the interior of a building, and asking if witness thought such construction safe, was not objectionable as not a proper subject for expert testimony. *N. & M. Friedman Co.* v. *Atlas Assur. Co.*, 213.

2. Upon an issue as to whether the fall of an insured building was caused by fire, in which there was evidence that fire was seen to issue from the building prior to its fall, and that the construction of the building was safe, expert testimony by contractors and builders that a fire which burned off the ceiling or floor joists would occasion the fall of the building in the manner in which it fell was not objectionable as assuming facts not in evidence. *Id.*

3. The matter was a proper subject for expert testimony. *Id.*

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EVIDENCE—Continued.

4. The fact that, in reciting the contents of a lost letter, a witness states matters that would not be admissible as original testimony, is not ground for reversal. *Conkling* v. *Nicholas*, 651.

See APPEAL AND ERROR (1, 5); BASTARDY; BILLS AND NOTES (5); BURGLARY (2); CARRIERS (12); CONSTITUTIONAL LAW (1, 2); CONTRACTS (4, 10, 11); CORPORATIONS (2); CRIMINAL LAW (1, 2, 9, 13); EXECUTION; FRAUD (1); LIFE INSURANCE (1); MALICIOUS PROSECUTION (3–5); MORTGAGES (1); PRINCIPAL AND SURETY (3, 4); RAILROADS (23, 24); RAPE; TAXATION (7, 9); TRIAL (1–5, 7, 8, 11, 16); WILLS (1–3); WITNESSES.

EXCEPTIONS—See APPEAL AND ERROR (4).

EXCHANGE—See SALE (1–3).

EXECUTION.

1. The fact that an execution is lost does not exclude the application of 3 Comp. Laws, § 10203, prescribing what shall constitute a *prima facie* case in a suit in aid of execution, but parol evidence of its contents may be given. *Crane* v. *Waldron*, 73.

2. In replevin for property seized on execution against plaintiff's husband, defendant was not prejudiced by the exclusion of the writ under which he claimed, where the court charged the jury that plaintiff could recover only such property as she had shown belonged to her. *Vicborn* v. *Pollock*, 524.

See APPEAL AND ERROR (1); CONSTITUTIONAL LAW (1, 2); FRAUDULENT CONVEYANCES (3); REPLEVIN.

EXECUTORS AND ADMINISTRATORS—See PRINCIPAL AND AGENT (2).

EXEMPTIONS—See RAILROADS (11).

EXPERT TESTIMONY—See EVIDENCE (1–3); TRIAL (8); WITNESSES (2).

EXPLOSIONS—See MASTER AND SERVANT (6–8, 10, 11).

EXTENSION OF TIME—See MUNICIPAL CORPORATIONS (15).

FAILURE OF CONSIDERATION—See JUSTICES OF THE PEACE (1); SALE (10).

FALSE IMPRISONMENT.

1. Arrest for a misdemeanor at one place, by direction of an officer who is at another place with the warrant, is illegal. *McCullough* v. *Greenfield*, 463.

2. Liability for an illegal arrest is not waived by the person, when arraigned, making no objection to the manner of the arrest, and pleading guilty. *Id.*

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FALSE IMPRISONMENT—Continued.

3. Where an arrest was made within the jurisdiction of the court issuing the process therefor, and was illegal only because the officer having the warrant was not present, but it was made by his direction, damages could be recovered only to the time he took the prisoner into his custody. *Id.* 464.

4. Where an officer has two prisoners, strangers to him, and it is long after dark, and he has a considerable distance to go with them, his liability for an illegal arrest is not increased by his handcuffing them. *Id.*

FALSE REPRESENTATIONS—See FRAUD.

FARE, RATES OF—See STREET RAILWAYS (7).

FELLOW-SERVANTS—See MASTER AND SERVANT (1, 13); RAILROADS (20).

FENCES—See BOUNDARIES (3).

FIRE INSURANCE.

1. In an action on a fire policy which provided that the insurance should terminate if the building should fall, except as the result of fire, evidence examined, and *held* not only to warrant a finding by the jury that the fall of the building was caused by fire, but to preclude the setting aside of such finding as against the weight of the evidence. *N. & M. Friedman Co.* v. *Atlas Assur. Co.*, 212.

2. A provision in a fire policy that if the building containing the insured property should fall, except as the result of fire, the insurance should immediately cease, was a condition subsequent, so that in an action on such policy to recover for the destruction of the property by fire, in which it appeared that the building fell, the burden was on the insurer to prove, as a defense, that it fell from some other cause than fire. *Id.*

3. A provision in a fire policy issued by a mutual company, to the effect that, in case of disagreement "as to the amount of valuation, in whole or in part, said matter in difference shall be determined by the arbitration committee," whose decision as to "the justness or validity of such claim" shall be final, and preclude any suit "to fix such amount or valuation," relates only to cases of disagreement as to the "valuation," and is not applicable to a controversy between the parties in which the validity of the claim against the company is in question. *Hogadone* v. *Grange Mut. Fire-Ins. Co.*, 340.

4. Plaintiff, a nonresident, applied to defendant company for insurance on a farmhouse, the risk being accepted on condition that all logs and brush be cleared for 100 feet around the building. She gave instructions to her tenant to clear away the rubbish, which he did to some extent. Thereafter the company made an assessment on the policy on the house, and took a new application on the barn located on the premises. It was claimed that a similar condition as to clearing was imposed with reference to the barn. Defendant's agent was at the premises when the barn was insured, and directed

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FIRE INSURANCE—Continued.

clearing within certain limits marked by him around the barn, which was done. The buildings were destroyed by fire, at which time there were some logs and brush within 100 feet of the house; but the fire was not aggravated thereby. *Held*, that such facts warranted a finding that the condition as to clearing had been waived. *Duby* v. *Farmers' Mut. Fire-Ins. Co.*, 661.

See DEEDS (5); TRIAL (7).

FORECLOSURE—See BUILDING AND LOAN ASSOCIATIONS (2).

FOREIGN CORPORATIONS—See BUILDING AND LOAN ASSOCIATIONS (3–5); MANDAMUS (2).

FORFEITURE—See DEEDS (12).

FRANCHISES—See MUNICIPAL CORPORATIONS (3, 4); STREET RAILWAYS (7).

FRAUD.

1. Testimony as to false representations made to induce plaintiff to enter into a contract is admissible, in an action to recover money paid thereon, as against an objection that it tends to vary the terms of the contract, which was in writing. *Rambo* v. *Patterson*, 655.

2. An agreement for the purchase by plaintiff of an interest in defendants' business gave him the right to terminate the arrangement, and to have his money refunded, in certain contingencies. He soon became dissatisfied, and an agreement for a settlement was entered into, which defendants failed to carry out; whereupon plaintiff at once brought an action for fraud and deceit in inducing the original agreement. *Held*, that he had not waived his right to bring such action. *Id.*

See BENEFIT SOCIETIES (2); DEEDS (7); MUNICIPAL CORPORATIONS (17, 19).

FRAUDULENT CONVEYANCES.

1. A decree setting aside a conveyance as in fraud of creditors was sustained, though based on independent facts constituting badges of fraud, rather than on proof of a deliberate plan to defraud. *Scandinavian Sveas Benevolent Soc.* v. *Linquist*, 91.

2. Knowledge on the part of a transferee of property of his grantor's intention to defraud creditors will invalidate the transaction, where the consideration consisted of part cash and part the discharge of an antecedent debt. *Id.*

3. Where a conveyance of mortgaged lands is set aside, except as to a homestead interest, at the suit of an execution creditor, the grantee, on redeeming from the mortgage, is entitled, in the absence of special circumstances, to be subrogated to the full extent of the mortgage lien, as against a purchaser at the execution sale. *Wolcott* v. *Tweddle*, 389.

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FRAUDULENT CONVEYANCES—Continued.

4. However, a decree requiring the homestead interest to bear its proportion of the mortgage debt was not disturbed, where the rents and profits of the premises, together with the proceeds of an insurance policy thereon, received by the grantee, more than equaled the amount deducted by the court from his claim under the mortgage. *Id.*

5. A conveyance made in fraud of creditors, while valid as between the parties, is absolutely void as to creditors, irrespective of the consideration paid by the grantee. *Morley Bros.* v. *Stringer*, 690.

6. Where a tenant in common of land incumbered by mortgage, with the active co-operation of his co-tenant, made a conveyance of his interest for the purpose of defrauding creditors, and the co-tenant, in furtherance of such purpose, paid off the mortgage, taking a new mortgage from the fraudulent grantee for the amount chargeable against such interest, such co-tenant was not entitled to be reimbursed for such payment, in a suit by a judgment creditor to set aside the conveyance. *Id.*

See CONSTITUTIONAL LAW (1, 2).

GARNISHMENT—See LIFE INSURANCE (7).

GENERAL ISSUE—See JUSTICES OF THE PEACE; PLEADING (1).

GIFTS.

1. In replevin for property claimed by plaintiff as a gift from defendant's decedent, evidence of decedent's statements, made during an illness, that he desired the property, then in the joint possession of plaintiff and himself, to be placed in the hands of plaintiff for a particular purpose, unaccompanied by evidence of plaintiff's acceptance of the property, and viewed in the light of the fact that for two years thereafter, and up to the time of his death, deceased exercised the same control over the property as theretofore, was insufficient to warrant a finding of a valid gift *inter vivos*. *Sparling* v. *Smeltzer*, 454.

2. But evidence of his subsequent statements that he had "given" the property to plaintiff, unless found to have related to the earlier transaction, was sufficient to justify such finding. *Id.*

See GUARDIAN AND WARD.

GRAND JURY—See CRIMINAL LAW (14, 15); WITNESSES (3, 4).

GUARDIAN AND WARD.

1. An instrument executed by a minor ward, purporting, in consideration of love and affection, and of the care and attention bestowed on her by her guardian, to convey to the latter an interest in the ward's share of the estate of her deceased father, then in the hands of trustees, is unenforceable. *Williams* v. *Davison's Estate*, 344.

2. So, too, is a like instrument, executed by a ward, in response to the importunities of the guardian, soon after arriving at majority, and before the settlement of the guardian's accounts. *Id.*

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HIGHWAYS—See CONTRIBUTORY NEGLIGENCE (1, 2); MUNICIPAL CORPORATIONS (8); STREET RAILWAYS (6).

HOMESTEAD — See FRAUDULENT CONVEYANCES (3, 4); PUBLIC LANDS; TAXATION (24, 25).

HOTELS—See INNKEEPERS.

HUSBAND AND WIFE — See DEEDS (6); DIVORCE; MARRIED WOMEN.

HYPOTHETICAL QUESTIONS — See EVIDENCE (1, 2); TRIAL (8).

INDICTMENTS, VALIDITY OF—See CRIMINAL LAW (14, 15).

INITIALS—See JUDGMENTS (2).

INJUNCTION — See DEEDS (3, 4); DRAINS (1); EQUITY JURISDICTION (2–5); STREET RAILWAYS (5).

INNKEEPERS.

1. The benefit accruing to an innkeeper from his observance of the custom of forwarding letters and packages to departed guests constitutes a sufficient consideration for his agreement to comply with such custom in a given case. *Baehr* v. *Downey*, 163.

2. The clerk of an inn has authority to bind the innkeeper by an agreement with a departing guest to forward packages received for the latter after his departure. *Id.* 164.

3. Where an innkeeper agreed to forward a package which was expected to arrive for a guest after his departure, and the package was delivered to the innkeeper after the departure of the guest, and was never returned or forwarded, the innkeeper was liable as an ordinary bailee. *Id.*

4. In such case, the value of the package (*i. e.*, $300) not being such as to require extraordinary precautions, a failure to mark such value on the package, or to notify the innkeeper thereof, was not such contributory negligence as would relieve the latter from liability. *Id.*

INSOLVENCY—See BANKS AND BANKING.

INSTRUCTIONS TO JURY—See BOUNDARIES (2, 3); CONTRACTS (6); CRIMINAL LAW (3–6); EMINENT DOMAIN (7); MASTER AND SERVANT (11); NEGLIGENCE (7); RAILROADS (9, 17, 20); SALE (3, 5–8); TRIAL (14); WILLS (4, 5); WITNESSES (1).

INSURANCE—See ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE.

INTENT—See RAPE (3).

INTEREST—See TENANCY IN COMMON (2).

INTERLOCKING TITLES—See ADVERSE POSSESSION (1).

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INTERNAL IMPROVEMENTS—See MUNICIPAL CORPORATIONS (4).

ISLANDS—See ADVERSE POSSESSION.

JOINT TRESPASSERS—See TORTS.

JUDGMENTS.

1. The discharge of a judgment on payment of less than the amount due thereon is void, for want of consideration, as to the amount remitted. *Upton* v. *Dennis*, 238.

2. A judgment cannot be attacked collaterally on the ground that defendant was described by his initials only, instead of his full Christian name; the record containing nothing to show that he was known by any other name than that given. *Vicborn* v. *Pollock*, 524.

3. On a bill in aid of execution, the judgment cannot be attacked for mere irregularities. *Morley Bros.* v. *Stringer*, 690.

See ACTIONS; REPLEVIN.

JUDICIAL POWER—See CONSTITUTIONAL LAW (4–7).

JURISDICTION—See DRAINS (3); EMINENT DOMAIN (5); EQUITY JURISDICTION; JUSTICES OF THE PEACE (2); PROBATE COURTS (1); RAILROADS (7); RECEIVERS (2).

JURY (GRAND)—See CRIMINAL LAW (14, 15); WITNESSES (3, 4).

JURY, QUESTIONS FOR—See ACCIDENT INSURANCE; CARRIERS (3, 4, 6, 8–10); CONTRACTS (3); CONTRIBUTORY NEGLIGENCE (1, 3, 5–7); LIBEL AND SLANDER; MUNICIPAL CORPORATIONS (8); NEGLIGENCE (6); PARTNERSHIP (2); RAILROADS (6, 8, 15, 16, 19, 20, 25); RAPE (2); SALE (2, 10, 12); TAXATION (4, 8).

JUSTICES OF THE PEACE.

1. 1 Comp. Laws, § 767, relating to pleadings in justices' courts, provides that the plea of the general issue shall be in the same form as in the circuit court, and notice of any defense not admissible under the general issue shall be given with such plea. Sections 769 and 828, relating to the same subject, provide, in substance, that a failure or want of consideration, in whole or in part, may be shown in defense to an action on any contract; the latter section further providing that evidence of a partial failure or want of consideration shall not be admitted unless notice of such defense be given. *Held*, that the defense of a total failure of consideration is admissible under a plea of the general issue, without notice. *Hubbard* v. *Freiberger*, 139.

2. By pleading the general issue in the circuit court on an appeal from a justice of the peace, defendant waives any objections to the jurisdiction of the justice because of defects in the process or irregularities in adjournments. *Township of Ovid* v. *Haire*, 353.

3. By such plea defendant also admits that there was a declara-

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JUSTICES OF THE PEACE—Continued.

tion, so as to justify the court in permitting plaintiff to amend the same. *Id.*

See AMENDMENTS (1); PLEADING (1).

LACHES—See ESTATES OF DECEDENTS (1).

LAND CONTRACTS—See MORTGAGES (2); VENDOR AND PURCHASER (2).

LANDLORD AND TENANT.

1. In May, 1898, the owner of a summer hotel leased it for a term ending October 1, 1903. The lease stipulated that, if the premises should become vacant, the lessor might re-enter and relet, applying the rental on the lessee's obligation. It was the lessee's practice at the end of the summer season to fasten the doors and windows, and leave his furniture; the hotel remaining unoccupied until the 1st of the ensuing June. The installments of rent were payable January 1st of each year, and in December, 1900, the lessor requested payment for the ensuing season, which was made. In April, 1901, the lessor sold the premises; the purchaser assuming the risk and expense of getting possession. Negotiations for a surrender of the lease having failed, the purchaser entered the premises; and, in ejectment by the lessee against the purchaser and the lessor, defendants relied on a breach of the covenant for continued occupancy. *Held*, that they were estopped to claim such breach. *Stoddard* v. *Gallagher*, 374.

2. A landlord is not liable to a licensee of his tenant, injured through the defective condition of the premises, by reason of the nonperformance of a covenant to repair. *Brady* v. *Klein*, 422.

3. One who lets premises in a defective condition is not liable to a stranger injured by the defect, unless it amounts to a public nuisance. *Id.*

4. *Thus:* A landlord of a dwelling is not liable to his tenant's child for injuries received by stepping into a hole in a doorsill, though he had agreed with the tenant to repair the defect. *Id.*

5. A provision in a lease that, on re-entry for nonpayment of rent, the subleases shall belong to the lessor, does not create such a relation between the landlord and a subtenant as to entitle the latter to hold the premises during the term, or make him liable to the landlord as tenant. *Williams* v. *Michigan Cent. R. Co.*, 448.

6. Where a landlord accepts from his tenant a surrender of the premises, and an assignment of the tenant's interest in subleases, but there is no reservation from the surrender, and no confirmation of the subleases, such assignment does not entitle the landlord to hold the subtenants. *Id.*

7. The relation of a subtenant to the original lessor cannot be affected by an agreement made between the lessor and the lessee after the termination of the latter's rights by notice to quit, though before a relinquishment of possession. *Id.*

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LANDLORD AND TENANT—Continued.

8. Where rents yet to accrue are assigned to secure the payment of a claim, a subsequent conveyance of the premises, under the order of the court, to a receiver, does not destroy the right created by the assignment, so as to entitle the receiver to the rents as against the assignee. *Brownson* v. *Roy*, 617.

9. Rents not yet due may be assigned without transferring to the assignee the title to the premises, and the assignee, after notice to the tenants, may collect the rent as it becomes due. *Id.*

10. An assignment of future rent is not ineffectual because made after the expiration of the occupant's lease, where the parties have continued the existence of the tenancy, and treated the assignment as operative. *Id.*

LARCENY.

Under 3 Comp. Laws, § 11553, providing for the punishment of "every person who shall commit the offense of larceny, by stealing, of the property of another, any money, goods or chattels," etc., a dog may be the subject of larceny. *Rockwell* v. *Oakland Circuit Judge*, 11.

LETTERS—See CONTRACTS (5).

LETTERS OF CREDIT—See BANKS AND BANKING (1).

LIBEL AND SLANDER.

Where, in an action for slander based on defendant's statement, "You took my money, and went to Owosso, and swore to a God damn lie, and I can prove it, and, damn you, you are getting ready to swear to a lie again," there was testimony tending to show that the accusation was made shortly after the trial of an action at Owosso in which plaintiff and defendant were witnesses on opposite sides, plaintiff was entitled to go to the jury on the question whether defendant meant that the alleged false swearing occurred in a judicial proceeding. *Dell* v. *McBride*, 649.

LIENS—See MASTER AND SERVANT (12).

LIFE INSURANCE.

1. A stipulation in an application for a life policy that, if the applicant's statements were untrue in any particular that would have led to his rejection if correctly stated, the policy should be void, is for the construction of the court, and the company's officers cannot be permitted to testify that the application would have been rejected if certain facts had been truthfully stated therein. *New Era Ass'n* v. *Mactavish*, 68.

2. Under the stipulation, it would require a material misrepresentation to avoid the policy. *Id.*

3. An applicant for insurance stated in his application that the cause of a sister's death was kidney inflammation, whereas it in fact was chronic pneumonia. *Held*, not *prima facie* a material misrepresentation. *Id.*

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LIFE INSURANCE—Continued.

4. Where, in a suit to cancel a life policy, there was testimony tending to show that insured would have been an acceptable risk in ordinary companies, notwithstanding a sister had consumption (he being over 40 years of age, and not living in her family), it could not be presumed that a statement by insured in his application that his sister enjoyed good health was a material misrepresentation. *Id.*

5. Where a life-insurance company, on being informed that an applicant for a policy had been rejected by another company, and had taken the gold cure, contrary to the representations in his application, brought the matter to the attention of the applicant, who explained that he had not been rejected, but had withdrawn his application, and had not taken the gold cure, but had merely gone to the institution to influence a friend to go, and the company issued the policy in reliance on such explanations, it could insist on the original warranties in case the explanations were untrue, but not otherwise. *Moore* v. *Mutual Reserve Fund Life Ass'n*, 526.

6. A life-insurance company, by issuing a policy with knowledge of the falsity of certain warranties in the application therefor, waives the right to rely on those warranties, but not on others, of the falsity of which it has no knowledge. So *held*, where an applicant stated that he had never been rejected by any company, though he had in fact been rejected by six or seven, and also falsely represented that he had never been attended by a physician, or been an inmate of any infirmary or institute, that he had policies in two other companies, and that no physician had ever given an unfavorable opinion as to his insurability, and the company applied to issued a policy after being informed that he had been rejected by two companies, and had taken the gold cure. *Id.*

7. The fact that a life-insurance company, on being garnished by a creditor of a beneficiary, merely filed a disclosure denying any indebtedness, and answered the special interrogatories, without setting up certain breaches of warranty on which it sought to rely until several months afterwards, when it obtained leave of court to file further answers, is insufficient to show a waiver of its right to rely on such warranties. *Id.* 527.

8. In an action founded on a life policy, the fact that the defendant insurance company was given the opening and rebutting in the introduction of testimony, because it had the burden of proving an alleged breach of warranty, did not affect the rule that plaintiff had the burden of proving a waiver of the breach by defendant. *Id.*

9. 2 Comp. Laws, § 7219, makes it a misdemeanor for a life-insurance agent to pay or allow any rebate of premium as an inducement to insurance. In an action by such agent on a premium note, the amount of which he had paid to the company, it appeared that he had induced defendant to take the insurance by giving him the benefit of the agent's commission of one-half the premium, taking the note in suit for the balance. *Held*, that the note was void for want of considera-

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LIFE INSURANCE—Continued.
tion, by reason of the illegality of the insurance contract. *Heffron* v. *Daly*, 613.

See BENEFIT SOCIETIES; PLEADING (2); WITNESSES (2).

LIFE-INSURANCE COMPANIES—See TAXATION (2).

LOST INSTRUMENTS—See AMENDMENTS (3); APPEAL AND ERROR (1); BILLS AND NOTES (1, 2); EVIDENCE (4); EXECUTION (1); PROBATE COURTS (1).

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution on a charge of burglary, evidence considered, and *held* to justify a finding of want of probable cause. *Gould* v. *Gregory*, 382.

2. Malice in the prosecution of a criminal charge may be inferred from a want of probable cause therefor. *Id.*

3. In an action for the malicious prosecution of a charge of burglary, it appeared that the charge was founded upon the taking by plaintiff of a horse and a basket from defendant's barn, and that plaintiff was at the time working for a tenant of defendant. *Held*, that evidence that the contract between defendant and his tenant required defendant to furnish two teams of horses, when necessary, and such farming utensils as might be needed, was admissible, though it was conceded that plaintiff was not acting under the tenant's orders on the occasion in question. *Id.* 383.

4. Evidence of the size of defendant's farm was admissible as bearing upon the question of the right of the tenant, and of plaintiff, as his employé, to use the horse and basket alleged to have been stolen. *Id.*

5. In an action for malicious prosecution, evidence had been admitted upon the issue of malice that defendant had stated that some one had been down to the cottages owned by him, had broken into the boathouses, and had knocked holes in the boats, and that he thought plaintiff was to blame for it. *Held*, that evidence as to the number of cottages owned by defendant was admissible. *Id.*

MANDAMUS.

1. *Mandamus* will not lie to vacate an order sustaining a demurrer to a plea in abatement. *Grand Rapids, etc., R. Co.* v. *Charlevoix Circuit Judge*, 122.

2. *Mandamus* will not issue to compel the Secretary of State to file the articles of association of a foreign corporation (*e. g.*, a tontine investment company), where, subsequent to the filing of the petition, a statute has become operative under which the rights claimed by relator have been abrogated. *Preferred Tontine Mercantile Co.* v. *Secretary of State*, 395.

3. *Mandamus* will not lie to compel a circuit judge to reinstate a plea in abatement, stricken from the files on the ground that the right to maintain it had been waived, since the action of

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MANDAMUS—Continued.

the court is reviewable on writ of error after final judgment, in case defendant shall see fit to stand upon his plea, and otherwise the point is waived. *Steel* v. *Clinton Circuit Judge*, 695.

MARRIED WOMEN.

A married woman's promise to pay for furnishings of a house occupied by herself and husband is not operative as to purchases previously made. *Beard* v. *Hoffman*, 624.

MASTER AND SERVANT.

1. An employé of an electric railway company, who, while returning from work on one of its cars, was injured through the negligence of the company in not providing a safe system for operating its road, is not precluded from recovery by the fact that the car was in charge of a fellow-servant. *Noe* v. *Rapid Railway Co.*, 152.

2. An employé of an electric railway company, who was furnished with transportation on the company's cars in going to and returning from work, did not assume the risk of defective appliances in connection with the track over which he rode, as his work was performed at a distance therefrom, and he had no duty calling his attention thereto. *Id.*

3. Where a street-railway motorman knew that cars were operated backward, on some occasions, without red lanterns being carried on the rear thereof, and that the company had not established telephone connections to warn following cars of a car being operated backward, he assumed the risk of the operation of such cars without such precautions. *Seccombe* v. *Detroit Electric Railway*, 170.

4. Before a master can be held liable for injuries to an employé on the ground that he had in his employ an incompetent servant, it must appear that he had been negligent either in employing or retaining such servant, and the burden of proof is upon the plaintiff. *Id.* 171.

5. In an action against a street-railway company for injuries to an employé, alleged to have been due to the incompetency of a conductor in its employ, witnesses testified that the conductor was slow in ringing bells, and was liable to get excited and give wrong signals; that his reputation for competency was "not the best;" that he was short, and had to stand on tiptoe to reach the bell cord, which made him slow in emergencies; but none of the witnesses had ever heard of his having an accident, or reported him as incompetent to the company or the "union." *Held*, insufficient to raise a presumption that defendant knew or ought to have known of his alleged incompetency, or to show that it should have removed him had it known all the facts testified to. *Id.*

6. A servant employed in a stone quarry as a "driller," under the direction of the "loader," attempted to load a hole with dynamite, and was injured by an explosion. The loader was not the foreman of the work, or one whose directions the

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MASTER AND SERVANT—Continued.

servant was bound to obey. *Held*, that the servant assumed the risk. ' *Kopf* v. *Monroe Stone Co.*, 286.

7. Where an employé in a stone quarry is told by the one who is in charge of the loading and shooting of blasts how to put dynamite in the holes, and is warned to be careful, the instructions are sufficient, and it is not necessary that he should be told not to attempt to force the dynamite into a hole too small to admit its entrance. *Id.* 287.

8. Evidence that the drillers in a stone quarry, contrary to the orders of the master, and, so far as appears, in the absence of all persons in authority, occasionally loaded holes for blasts, is insufficient to charge the master with knowledge of such practice. *Id.*

9. Case ruled by former decision, 129 Mich. 278. *Barr* v. *Guelph Patent Cask Co.*, 322.

10. Where, in an action by an employé for injuries caused by the explosion of a boiler, alleged to have been due to overpressure, it appeared that the boiler had recently been repaired and tested by a competent workman, who had pronounced it safe to be operated under a pressure higher than that carried at the time of the accident, and that it had been successfully operated for several years under such higher pressure, and all of the expert witnesses testified that they should have thought it capable of withstanding it, a verdict should have been directed for defendant. *Beunk* v. *Valley City Desk Co.*, 440.

11. An instruction in such action that it was the duty of defendant to furnish a safe and suitable boiler, and then keep it in that condition, and that defendant was bound, in using it, to keep within the limits of safety, was erroneous as imposing too high a degree of care; reasonable care only being required. *Id.*

12. A person employed by the owner of certain charcoal kilns to fire the same, and to perform certain other work in connection therewith, at an agreed compensation, together with the use of a small house on the premises, with fuel and light, is in possession as an employé only, and not as a bailee for hire, and hence has no lien on the charcoal for his wages, entitling him to maintain trover against a railroad company shipping it away in disregard of his claim. *Van Lessler* v. *Ann Arbor R. Co.*, 664.

13. Where, in an action by an employé in a factory for injuries caused by the fall of a rack used for the storage of lumber, due to the act of defendant's foreman in directing that certain heavy pieces of lumber be placed thereon, it appeared that, while the rack had theretofore been used for light lumber only, no rule on the subject had been promulgated, that it had been built but two months, and that it was only partially filled on the occasion in question, the jury were warranted in finding that the foreman was using the rack for a purpose for which it was intended, and hence that plaintiff's injury was not due to the negligence of a fellow-servant. *Corbett* v. *American Screen Door Co.*, 669.

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MASTER AND SERVANT—Continued.

14. The fact that the rack fell when only half full, and that the light material that was on it at the time constituted half the weight thereon, afforded evidence of the insufficiency of the rack under any theory. *Id.*

15. It appearing that plaintiff had no occasion to use or to examine the rack, and he having testified that he supposed it was safe, and had no idea that it would fall, it could not be said that he had assumed the risk. *Id.*

See CONTRIBUTORY NEGLIGENCE (6, 7); NEGLIGENCE (1–3); RAILROADS (18–25); STREET RAILWAYS (1–4).

MENTAL COMPETENCY—See BENEFIT SOCIETIES (1, 4); DEEDS (1, 7–9); WILLS (1–5).

MERGER—See DOWER (1); EASEMENTS.

MISDEMEANORS—See FALSE IMPRISONMENT (1).

MORTGAGES.

1. In a suit to declare a warranty deed a mortgage, evidence of the circumstances surrounding the transaction, the conversation at the time, and the value of the land, is admissible. *Carveth* v. *Winegar*, 34.

2. A deed absolute in form, accompanied by a contract to return to the vendor one-half of the proceeds of the land if sold within a year, after deducting the amount of an outstanding mortgage, the vendor's debt to the vendee, and the value of certain property deeded by the vendee to the vendor, *held*, under the evidence, to amount to a mortgage. *Id.*

3. The existence of an innocent purchaser, who has made improvements, will not prevent the court from declaring a deed absolute in form to be a mortgage, if the purchaser can be fully protected on the accounting. *Id.* 35.

See BUILDING AND LOAN ASSOCIATIONS; EMINENT DOMAIN (5); EQUITY JURISDICTION (2); FRAUDULENT CONVEYANCES (3, 4, 6); PARTITION; TENANCY IN COMMON (2); VENDOR AND PURCHASER (1).

MOTION TO QUASH—See CRIMINAL LAW (15).

MULTIPLICITY OF SUITS—See EQUITY JURISDICTION (5).

MUNICIPAL CORPORATIONS.

ORDINANCES: DISORDERLY PERSONS.

1. A charter provision authorizing the common council to provide by ordinance for the punishment of "disorderly persons of all kinds" should be construed in its ordinary sense, and not as limiting the authority of the council to legislate with reference to such conduct as would be regarded as disorderly under the general statute (2 Comp. Laws, § 5923) or the common law. *In re Stegenga*, 56.

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MUNICIPAL CORPORATIONS—Continued.

2. A city ordinance declaring that any person found loitering in any barroom, or wandering about the streets, without any lawful means of support, or without being able to give a satisfactory account of himself, shall be deemed a disorderly person, and punishable as such, is not void as an unreasonable abridgment of the right of personal liberty. *Id.*

STREET-RAILWAY FRANCHISES: PAVING.

3. A provision in a franchise granted by a city to a street-railway company, that all repaving or repairing of pavements on streets used by the company shall be done at the expense of the city, without any charge whatever against the company, makes it the duty of the city to repair the foundation necessary for the support of the company's tracks. *City of Detroit* v. *Detroit United Ry.*, 608.

4. It is no objection to the validity of such provision that such foundation must be heavier than that required by the ordinary traffic on the streets; nor can it be said that the city thereby engages in a work of internal improvement. *Id.* 609.

See STREET RAILWAYS (7).

EMPLOYÉS: SALARIES.

5. Under the charter of the city of Detroit, where the board of estimates has stricken an item for the salary of a certain clerk from the estimate for the expenses of a department, the controller cannot be compelled by the council to draw a warrant for the salary of such clerk, though provided to be paid from a fund derived otherwise than from taxation. *City of Detroit* v. *Blades*, 249.

CLAIMS: PRESENTATION TO COUNCIL.

6. Under a city charter forbidding suit against the city on a claim until after presentation thereof to the council, the presentation of a claim by one who has assigned it as security will support an action by him with the knowledge and acquiescence of the assignee. *Lamson* v. *City of Marshall*, 250.

7. A provision of a city charter making it a sufficient defense to an action for the collection of any demand or claim against the city, that it has never been presented to the council for allowance, does not apply to actions *ex delicto*,—*e. g.*, an action for flooding premises through the clogging of a sewer. *Pollard* v. *City of Cadillac*, 503.

DEFECTIVE HIGHWAYS.

8. Where plaintiff was injured by falling over a loose board that had been placed in the gutter a few hours previously by the agents of defendant village while constructing a sidewalk, it was for the jury to say whether there was negligence in thus disposing of the material, or whether the street was in a reasonably safe condition for public travel under the circumstances. *Finch* v *Village of Bangor*, 149.

See CONTRIBUTORY NEGLIGENCE (1, 2); NEGLIGENCE (4).

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MUNICIPAL CORPORATIONS—Continued.

CONTRACTS FOR PUBLIC IMPROVEMENTS.

9. A contract for the construction of a sewer for a city provided for final payment on the work being completed in accordance with the contract, and to the satisfaction of the engineer, and on its being tested in such manner as should, in his opinion, be sufficient, and on a certificate being made by him showing the completion of the work. It also provided that no pipe should be laid in water; that water should not be allowed to run through the pipes during the construction, unless with the permission of the engineer; and that, in case of misunderstanding as to the meaning of the contract, the engineer's interpretation should be final. The sewer proved defective by reason of the pipes having been laid in water, in consequence of which the engineer refused a certificate. *Held*, that if such method of construction was directed, *and not merely permitted*, by the engineer, the contractor could maintain an action on the contract, though this method was favorable to him, and he knew that he could not thereby make a tight sewer, and though the contract further provided that, while the engineer might assent to special means of prosecuting work in difficult cases, this should not relieve the contractor of responsibility for the result, and that he should be liable for any defects in material or workmanship that might become apparent before final settlement. *Lamson* v. *City of Marshall*, 251.

10. Especially was this so where the city was advised of the facts during the progress of the work, and paid the monthly estimates without objection. *Id.*

11. A city is not estopped to set up an insufficient performance of a sewer contract by the mere fact of its payment of periodical estimates without protest. *Id.*

12. General authority on the part of a city engineer to modify a sewer contract cannot be inferred from the fact that he is authorized to direct the manner of its performance. *Id.*

13. Under a contract for the construction of a sewer for a city, providing for final payment on a certificate by the city engineer that the work has been completed and that all claims for labor and material have been satisfied, the existence of such claims when suit was begun by the contractor will not prevent a recovery, where the engineer, though knowing of the claims, said nothing about them in his notice that he would decline to accept the work until the sewer should be repaired, and the city was protected against liability for them by a sufficient bond, and they were in fact paid before the trial. *Id.*

14. A provision in a contract for the construction of a sewer for a city, under the head, "Penalty for Noncompletion of Work," that, if the work is not completed by the stipulated time, the contractor shall pay the city $10 a day while in default, as liquidated damages for the delay, and also the cost to the city of engineering, inspection, and superintendence during the default, is, as to the $10 a day, not a penalty, but a proper stipulation as to damages. *Id.* 252.

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MUNICIPAL CORPORATIONS—Continued.

15. There is not an extension of time by a city council, within a contract for the construction of a sewer for the city, providing for damages if the work be not completed at the stipulated time, or within such further time as may be allowed by the council, where, on petition for an extension, they merely adopt a report reciting that, while no advantage is desired, they believe it best to allow the matter to stand until final settlement, when all matters can be as readily settled as now. *Id.*

16. A provision in a contract for the construction of a sewer for a city, for payment to the city of damages of $10 a day for failure to complete it at the stipulated time, is not waived by permitting the contractor to complete it under the supervision of the city's engineer, and by receiving and paying estimates for the work. *Id.*

17. Under a contract for the construction of a city sewer, providing a higher price for rock excavation than for earth, and stating what shall be classified as earth and what as rock, payment to be made after the estimate of the city's engineer, whose interpretation of the contract is to be final, has been approved by the city council, his estimate is binding, if honestly made; and one attacking it has the burden of proving dishonesty. *Id.*

18. The contractor under such contract has no right to be present at a conference between the engineer and his assistant to determine how to classify the material excavated. *Id.*

19. That a city engineer's estimate of the rock excavated by a contractor in constructing a sewer for the city was only 1,600 cubic yards, while there were 2,400 cubic yards, is not evidence of bad faith, destroying the binding effect of his estimate; but the fact that, when the contractor was entitled to his first estimate, the engineer declined to make one on the ground that "it might scare the city fathers," saying that he would "wait until we got scattered around on the outside trenches, and then they wouldn't know where we were, or what the estimate was for," in connection with the fact that rock was not anticipated, does justify an inference that the estimate was not the engineer's honest judgment. *Id.* 258.

MUTUAL BENEFIT ASSOCIATIONS—See BENEFIT SOCIETIES.

MUTUAL INSURANCE—See FIRE INSURANCE (3).

NAMES—See JUDGMENTS (2).

NATURAL JUSTICE—See DEEDS (9); WILLS (4).

NECESSITY—See RAILROADS (6, 9).

NEGLIGENCE.

1. It cannot be said that the negligence of an electric railway company in not providing a lock for one of its switches was

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NEGLIGENCE—Continued.

not the proximate cause of an injury occasioned by the throwing of the switch by a trespasser. *Noe* v. *Rapid Railway Co.*, 152.

2. Where plaintiff, a street-railway motorman, was injured by a collision with a car which was being backed on the same track on which his car was being operated, for the purpose of obtaining relief for a car which had been derailed by reason of a defect in the track some distance ahead, the defect in the track was not the proximate cause of the injury. *Seccombe* v. *Detroit Electric Railway*, 170.

3. Negligence cannot be predicated upon the act of the conductor of an electric car in jumping therefrom to escape an impending collision, after he has signaled the motorman to stop, and done all that he can to avert the accident. *Id.*

4. Where a pedestrian, by reason of the wet condition of a sidewalk, slips into a hole therein, and is injured, her slipping cannot be said to be the proximate cause of her injury, so as to relieve the municipality from liability. *Burrell* v. *City of Greenville*, 235.

5. Plaintiff, an employé of a cartage company, while engaged in hauling steel to defendant, drove upon a platform scale on its premises, for the purpose of weighing his load, and was injured by the platform's giving way. The platform was adjacent to the premises of another corporation, the beam of the scales being in its office; and the scales were used in common by it and defendant. The actual ownership of the scales seemed to be in some doubt. *Held*, that defendant's liability did not depend on its ownership of the scales, but, having impliedly invited plaintiff to use them, it was responsible for defects which, by the exercise of due diligence, it could have remedied. *McIntyre* v. *Pfaudler Vacuum Fermentation Co.*, 552.

6. In an action for injuries caused by the giving way of a platform scale, alleged to have been due to the rotten condition of the supporting timbers, evidence examined, and *held* not to show conclusively that the timbers were renewed within the time claimed by defendant; making the question of its negligence, in not discovering and remedying the defect, one for the jury. *Id.*

7. Where all of the testimony in such action tended to show that timbers of the character of those in question might reasonably be expected to last at least five years, an instruction authorizing the jury to find defendant negligent "if ordinary experience ought to have advised a reasonably prudent man that the timbers would not remain sound for a period of a little more than four years" was erroneous. *Id.*

See BAILMENTS; CARRIERS (5–11); CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT (1–11, 13–15); MUNICIPAL CORPORATIONS (8); RAILROADS (12–25); STREET RAILWAYS (1–4).

NEGOTIABLE PAPER—See BILLS AND NOTES.

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NOTICE—See BONA FIDE PURCHASERS; DRAINS (5, 6); FRAUDULENT CONVEYANCES (2); JUSTICES OF THE PEACE (1); LANDLORD AND TENANT (7); MASTER AND SERVANT (5, 8); PLEADING; PRINCIPAL AND SURETY (4); SALE (17).

NUISANCE—See LANDLORD AND TENANT (3).

OFFICERS—See PUBLIC OFFICERS.

ORDER OF PROOF—See LIFE INSURANCE (8).

ORDINANCES—See MUNICIPAL CORPORATIONS (1–4).

PARENT AND CHILD—See DEEDS (12).

PAROL EVIDENCE—See BILLS AND NOTES (5); CONTRACTS (10, 11); EXECUTION (1).

PARTIES—See EJECTMENT (1); EMINENT DOMAIN (5); RAILROADS (3); TAXATION (6, 10); TOWNSHIPS; TROVER.

PARTITION.

Under 3 Comp. Laws, § 11020 *et seq.*, § 11050 *et seq.*, a tenant in common can maintain a partition suit against his cotenant, though the latter has redeemed the property from a foreclosure sale, and the former has neither paid nor tendered his share of the cost thereof. *Wettlaufer* v. *Ames*, 201.

See DOWER (2).

PARTNERSHIP.

1. Where property of a third person is unlawfully taken by one of two partners, and is employed in the partnership business, the other partner is liable for its use, though supposing it to belong to his copartner. *Sunlin* v. *Skutt*, 208.

2. In replevin for property claimed by plaintiff as surviving partner, the question of the existence of a partnership was properly submitted to the jury, where there was evidence from which they might infer a purpose to make the property common property, though it was quite as consistent with the theory that no such purpose existed. *Sparling* v. *Smeltzer*, 454.

See BANKS AND BANKING (2); TAXATION (4, 5); TROVER.

PASSENGERS—See CARRIERS (12); RAILROADS (12–17).

PAVING—See MUNICIPAL CORPORATIONS (3, 4).

PAYMENTS—See BILLS AND NOTES (1–3); BUILDING AND LOAN ASSOCIATIONS (3, 5); MUNICIPAL CORPORATIONS (11, 16); TAXATION (11).

PENALTY—See MUNICIPAL CORPORATIONS (14).

PERJURY—See LIBEL AND SLANDER.

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PERSONAL INJURIES—See CARRIERS (3, 4); CONTRIBUTORY NEGLIGENCE; LANDLORD AND TENANT (2-4); MASTER AND SERVANT (1-11, 13-15); MUNICIPAL CORPORATIONS (8); NEGLIGENCE; RAILROADS (12-25); STREET RAILWAYS (1-4).

PERSONAL LIBERTY—See MUNICIPAL CORPORATIONS (2).

PHOTOGRAPHS—See CRIMINAL LAW (9).

PHYSICIANS—See CONTRACTS (2, 3); CRIMINAL LAW (8); PUBLIC HEALTH.

PLEADING.

1. The defense to an action of trespass to personal property, that plaintiff settled with defendant's co-trespasser, is inadmissible under the general issue, even in justice's court. *Sunlin* v. *Skutt*, 209.

2. The illegality of a contract of life insurance, because made in violation of the anti-rebate law, need not be pleaded in defense of an action on a premium note, as it is the duty of the court to take notice of the illegality *sua sponte*. *Heffron* v. *Daly*, 613.

3. In an action for the breach of a contract for the sale of fruit, a notice attached to a plea of the general issue, setting up, in substance, that plaintiff agreed to have funds in the bank at a certain place to pay drafts for the fruit, which defendant was to draw from time to time as shipments were made, and that a draft for fruit shipped in accordance with the contract was returned unpaid, whereupon defendant, having heard that plaintiff had left the State, taking his funds with him, sold the fruit to third parties,—is sufficient to apprise plaintiff that defendant will rely on the former's abandonment of the contract. *Town* v. *Jepson*, 673.

See AMENDMENTS; CRIMINAL LAW (7, 8); EQUITY PLEADING; JUSTICES OF THE PEACE.

POSSESSION OF LANDS—See ADVERSE POSSESSION; MASTER AND SERVANT (12).

PRACTICE IN CIRCUIT COURT.

An order striking a plea in abatement from the files has the same effect as if the judge had directed a jury to render a verdict for the plaintiff upon the trial of the issue raised by the plea. *Steel* v. *Clinton Circuit Judge*, 695.

See AMENDMENTS; CRIMINAL LAW (15); JUSTICES OF THE PEACE (2, 3); MANDAMUS (3).

PRACTICE IN SUPREME COURT—See APPEAL AND ERROR.

PREFERENCES—See BANKS AND BANKING (1).

PRESUMPTIONS—See BILLS AND NOTES (2); DOWER (1); LIFE INSURANCE (4); TENANCY IN COMMON (3); TRIAL (14).

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PRINCIPAL AND AGENT.

1. Ratification of the compromise of a claim by a collection agent cannot be based on a letter written by the creditor without full knowledge of the facts. *Upton* v. *Dennis*, 238.

2. Any authority conferred upon a collection agent by an administrator to compromise a claim belonging to the estate is terminated by the discharge of the administrator. *Id.*

See BUILDING AND LOAN ASSOCIATIONS (5); CORPORATIONS (2); INNKEEPERS (2); MUNICIPAL CORPORATIONS (9, 12); SALE (14, 15); TROVER; WITNESSES (7).

PRINCIPAL AND SURETY.

1. Where a judgment was obtained against a principal and his surety, and a levy made on the land of each, and subsequently, by collusion between them, the principal's land was sold to a third person, who was ignorant of the levy, the surety could not maintain a bill to restrain the sheriff from first selling his land in satisfaction of the judgment. *Stratton* v. *Thomas*, 281.

2. One who signs a bond as surety upon the understanding that it shall also be signed by another, whose name appears in the body thereof, as a co-surety, is not liable where the bond is delivered without the latter's signature, and with a line drawn through his name therein. *People, for Use of National Sewer-Pipe Co.*, v. *Sharp*, 378.

3. Where a surety on a bond defends on the ground that he signed on condition that another surety be obtained, which was not done, the restriction of his cross-examination by excluding evidence of his statements that he understood that one who did sign with him was a principal is not ground for reversal. *Id.* 379.

4. In an action on a bond, the testimony of the sureties as to conversations with the principal at the time they signed it, to the effect that it should not be used unless also signed by a third person, is admissible, under proper pleadings, in view of the notice conveyed to the obligee by the presence of such third person's name in the body of the bond, both as part of the *res gestæ*, and as defining the obligation which the sureties were willing to undertake. *Id.*

See AMENDMENTS (2); BILLS AND NOTES (5-7).

PRIVILEGE—See CRIMINAL LAW (1); WITNESSES (3, 4).

PROBABLE CAUSE—See MALICIOUS PROSECUTION.

PROBATE COURTS.

1. Under 1 Comp. Laws, §§ 650, 651, conferring general authority on probate courts to probate wills and settle estates, a probate court may admit to probate a lost or destroyed will. *Ewing* v. *McIntyre*, 459.

2. 3 Comp. Laws, § 9386, provides that any executor, administrator, or creditor may appeal from the decision and report

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PROBATE COURTS—Continued.

of the commissioners on claims in the probate court to the circuit court, if application for such appeal is filed in the probate office within 60 days from the return of the report. Section 9387 provides that, on appeal by a claimant, he shall, "within the time aforesaid, and before such appeal shall be allowed, give a bond to the adverse party, * * * to be approved by the judge of probate, and filed in his office." Section 9395 provides that, when an executor or administrator declines to appeal, any person interested in the estate as creditor, heir, etc., may do so, in the same manner as the executor or administrator might have done, providing that such appellant shall, "before the appeal shall be allowed, give a bond, to be approved by the judge of probate." *Held*, that, to perfect such an appeal by an heir, the appeal bond must be first approved by the judge of probate, and then filed within the time prescribed. *Bartlett* v. *Wayne Circuit Judge*, 604.

PROMISSORY NOTES—See BILLS AND NOTES.

PROTEST—See TAXATION (11).

PROXIMATE CAUSE—See NEGLIGENCE (1, 2, 4).

PUBLIC HEALTH.

1. A board of supervisors which has contracted with a physician, for a gross sum duly paid, to attend all indigent persons in a certain district who may, within a given time, be afflicted with diseases dangerous to the public health, cannot be compelled to pay again for the services of such physician, though claimed to have been rendered at the direction of a local board of health under 2 Comp. Laws, § 4424, which has allowed the bill therefor as a claim against the county. *Zimmerman* v. *Board of Sup'rs of Cheboygan Co.*, 494.

2. Where accounts for supplies furnished and services rendered to indigent persons afflicted with contagious diseases have been allowed by a local board of health, under 2 Comp. Laws, § 4424, as claims against the county, the board of supervisors of such county cannot refuse to pay the same on the ground that such persons were residents of another county. *Id.*

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (9–19).

PUBLIC LANDS.

In an action for the purchase price of certain logs, evidence considered, and *held* to show conclusively that the logs were unlawfully cut from land held under an unperfected homestead entry, and to warrant the direction of a verdict for defendant. *Colburn* v. *I. Stephenson Co.*, 437.

PUBLIC OFFICERS.

1. Section 28 of the schedule of the Constitution, providing that the terms of office of all State and county officers, etc., shall begin on the 1st day of January next succeeding their elec-

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PUBLIC OFFICERS—Continued.

tion, was not a permanent limitation on the power of the legislature, and did not prohibit the enactment of Act No. 294, Local Acts 1895, providing that thereafter the term of office of the treasurer of Wayne county should begin on the 1st day of July next succeeding his election, and continue for the term of two years from such date. *Hunt, ex rel. Snow*, v. *Buhrer*, 107.

2. Conceding the unconstitutionality of the proviso to said act, which undertook to extend the term of the then incumbent of said office for six months (*i. e.*, to July 1, 1897), the entire act was not thereby invalidated, since any vacancy in the office between the terms might be filled by appointment by the board of supervisors, under 1 Comp. Laws, § 2587. *Id.*

PUBLIC POLICY—See CONSIDERATION; CONTRACTS (1).

QUANTUM MERUIT—See CONTRACTS (6–8).

QUESTIONS FOR JURY—See ACCIDENT INSURANCE; CARRIERS (3, 4, 6, 8–10); CONTRACTS (3); CONTRIBUTORY NEGLIGENCE (1, 3, 5–7); LIBEL AND SLANDER; MUNICIPAL CORPORATIONS (8); NEGLIGENCE (6); PARTNERSHIP (2); RAILROADS (6, 8, 15, 16, 19, 20, 25); RAPE (2); SALE (2, 10, 12); TAXATION (4, 8).

RAILROADS.

RIGHTS OF WAY: CONDEMNATION PROCEEDINGS.

1. 2 Comp. Laws, § 6243, provides that the petition in condemnation proceedings by a railroad company shall contain a statement that it is the intention of the company to construct a railroad from and to the places named in its articles of association. A petition for condemnation recited that the company was organized for the purpose of constructing a railroad from L. to the shore of Lake Michigan, at or near M.; that it had caused surveys to be made, and located its road in accordance therewith; and that it intended to construct such road from L. as far as R., "and thence to the shore of Lake Michigan." *Held*, a sufficient compliance with the statute. *Marquette, etc., R. Co.* v. *Longyear*, 94.

2. It is not necessary that a railroad company seeking to condemn a right of way under 2 Comp. Laws, § 6242 *et seq.*, shall embrace in one petition all lands within the county necessary to be so acquired for the construction of its road. *Id.*

3. Hence an objection that certain persons not made parties to a proceeding are entitled to damages is without force. *Id.*

4. 2 Comp. Laws, § 6234, subd. 5, provides that no railroad shall be constructed on any street until compensation shall have been made to the owners of property adjoining the street, and opposite where such railroad is to be constructed. *Held*, that the owner of property abutting on the opposite side of a street from that in which a road is to be laid is entitled to compensation. *Id.*

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RAILROADS—Continued.

5. But property situated some distance from such street, with another street intervening, though used in connection with land abutting on the former street, is not "adjoining" property, within said statute. *Id.* 95.

6. Where, in proceedings by a railroad company to condemn a right of way, both the court and jury, on conflicting testimony, have found the proposed road to be a public necessity, their decision will not be reviewed on appeal. *Detroit, etc., R. Co.* v. *Hall*, 302.

7. Where, in condemnation proceedings by a railroad company, the court, upon the issue whether a *bona fide* effort had been made to acquire the land, decided, on the evidence offered, that it was a case for a jury, but that the landowner might later offer additional evidence as to value for the purpose of perfecting the record, the refusal of another judge, before whom the matter was taken up, to hear the additional testimony, did not oust the court of jurisdiction to impanel a jury. *Id.* 303.

8. Where, in condemnation proceedings by a railroad company, the jury viewed the premises, and the testimony as to value was conflicting, their finding thereon will not be reviewed on appeal. *Id.*

9. In proceedings by a railroad company to condemn a right of way, an instruction that railroads are public necessities, and that the taking of land for railroads is taking land for a public use, was not objectionable as removing the question of necessity from the jury, where other instructions specifically stated that it was for the jury to determine whether the proposed road was a public necessity, and whether it was necessary to take the land in question therefor. *Id.*

10. 2 Comp. Laws, § 6248, providing for an appeal from "the appraisal or report of the commissioners or jury" in condemnation proceedings by a railroad company, does not authorize an appeal from the allowance of attorney's fees to the owner of land condemned, made under the express authority of section 6240. *Id.*

TAXATION.

11. A stock of groceries kept by a railroad company to furnish supplies for the crews and passengers of a line of steamboats operated by it under authority of 2 Comp. Laws, § 6269, is not subject to taxation under the general tax law, but is expressly exempted therefrom by 2 Comp. Laws, § 6277, providing for the payment of specific taxes by railroad companies "in lieu of all other taxes upon the properties of such companies," except certain specified real estate. *Pere Marquette R. Co.* v. *City of Ludington*, 397.

See TAXATION (1).

INJURIES TO PASSENGERS.

12. Railroad companies have the right to prescribe the conditions

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RAILROADS—Continued.

on which passengers may ride on freight trains. *Greenfield* v. *Detroit, etc., R. Co.*, 557.

13. One riding upon a freight train by arrangement with the conductor, contrary to a rule of the company known to both, is not a passenger. *Id.*

14. A railroad company may waive a rule forbidding the carrying of passengers on freight trains without a permit, by a long-continued disregard thereof. *Id.* 558.

15. In an action for injuries received while riding on defendant's log train, in which it appeared that a rule of the company required persons so riding to have permits, plaintiff testified that he frequently rode without them, and had so ridden when defendant's train-master was aboard; that he had not obtained a permit for a long time, and had never been refused passage. Others testified that it was customary to ride without them, on the payment of fares. The fares and mileage collected were reported to the company. *Held*, to warrant the jury in finding that the rule had been waived. *Id.*

16. In an action for injuries to a passenger on a log train, caused by the derailment of a car, evidence examined, and *held* to raise a question for the jury:
(1) As to whether logs not chained were properly loaded.
(2) As to the existence of a defect in a car wheel that a proper inspection would have disclosed. *Id.*

17. A refusal to instruct that "if plaintiff was a passenger on defendant's log train, and the accident which caused his injury occurred while the train was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, then plaintiff cannot recover," was not prejudicial error, in view of the explicit instructions given as to the particular acts of negligence relied on. *Id.*

INJURIES TO EMPLOYÉS.

18. Where, in an action for injuries to a section hand while loading rails on moving cars, there was no proof to rebut evidence that rails were ordinarily loaded on cars while in motion, the adoption of such method did not constitute negligence. *La Barre* v. *Grand Trunk Western R. Co.*, 192.

19. Whether it was the duty of the railroad company to have instructed such employé as to the manner of doing the work, and to have warned him against the danger of a rail falling from a car after it had been thrown thereon, was for the jury. *Id.*

20. Plaintiff in such action claimed that the injury was occasioned by undue haste in moving the train, which was at the time in charge of an assistant roadmaster, the conductor being absent; but such roadmaster testified that the speed of the train was entirely controlled by the engineer. *Held:*

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RAILROADS—Continued.

(1) That whether the injury was due to the roadmaster's negligence was a question for the jury.

(2) That, if it *was* so due, defendant was liable, as the roadmaster was not plaintiff's fellow-servant, but a vice-principal.

(3) That, if the negligence of the engineer alone caused the accident, there could be no recovery, as the engineer *was* such fellow-servant.

(4) That it was error not to give the last-mentioned proposition in instruction to the jury; a general charge that plaintiff could not recover if his injury was due to the negligence of a fellow-servant being insufficient. *Id.*

21. A railroad brakeman was injured while operating a lever used in connection with a semaphore signal. It was a cold night. He had a lantern in his left hand. He stooped over, and with his right hand drew the pin which held the lever down. When the pin was pulled, the lever flew up, and struck him on the head. If he had put his foot or hand on the lever, the accident would not have happened. It was his claim that the upper wire of the device was unnecessarily taut. *Held*, error to refuse to direct a verdict for defendant, the appliance being reasonably safe, and the brakeman not having used proper care. *Chapman* v. *Pere Marquette R. Co.*, 311.

22. A brakeman, while running backward on a side track, adjusting the coupling on a car, was tripped by stepping into an open drain under a switch, run over, and killed. The drain had been there for years, and the brakeman had been in the employ of the railroad for more than a year, as a member of a switching crew which daily stopped at the siding for dinner, and put in or took out cars there four or five times a day. No complaint had ever been made by him as to the condition of the drain. *Held*, that he had assumed the risk. *Miller* v. *Detroit, etc., R. Co.*, 564.

23. In an action by a railroad brakeman for injuries sustained by being run over by a car while he was walking in front of the same in an endeavor to adjust a coupling, evidence that it was the custom of employés of defendant to go in front of moving cars, in coupling them, was admissible, though no rule on the subject had been promulgated, and there was therefore no occasion to prove a waiver. *De Cair* v. *Manistee, etc., R. Co.*, 578.

24. Where a brakeman, who was injured while passing in front of a moving car, alleged that he was in the performance of his duty as a brakeman, and was using due care, at the time, it was competent for him to testify as to his purpose in going in front of the car. *Id.* 579.

25. Evidence that a railroad company, after a washout in its yard, constructed a ditch across the main track, 18 inches wide and 12 inches deep, and allowed the same to remain for some time, filled with snow even with the ties, in consequence of which a brakeman was injured while making a coupling, is

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RAILROADS—Continued.
sufficient to justify a finding of negligence on the part of the company. *Id.*

See CARRIERS; CONTRIBUTORY NEGLIGENCE (3, 4, 6); STREET RAILWAYS.

RAPE.

1. In a prosecution for carnally knowing a girl 12 years old, evidence of complaints made by her almost immediately after the alleged offense is admissible. *People* v. *Rich*, 14.

2. In a prosecution for rape, where the testimony of the prosecutrix was contradicted by that of respondent, but the latter's conduct, immediately after the arrest of his brother on a similar charge, was indicative of a fear of prosecution, and tended to corroborate the charge, the case was peculiarly one for the jury, and a conviction was not disturbed. *People* v. *Randall*, 516.

3. In a prosecution for assault with intent to commit the crime of rape, evidence considered, and *held* to support a finding that the assault was with the intent charged. *People* v. *Toutant*, 520.

See APPEAL AND ERROR (5); CRIMINAL LAW (2, 6).

RATIFICATION—See DEEDS (7); PRINCIPAL AND AGENT (1); SCHOOLS AND SCHOOL DISTRICTS (1).

REASONABLE DOUBT—See CRIMINAL LAW (6).

REBATES—See LIFE INSURANCE (9); PLEADING (2).

RECEIVERS.

1. The regularity of the appointment of a receiver, as having been made without notice, cannot be questioned by bill filed in a court of concurrent jurisdiction with the court making the appointment. *McKay* v. *Van Kleeck*, 27.

2. The respective rights of two receivers for the same property, appointed by different courts, should be adjusted by the court which first acquired jurisdiction; and an order of such court authorizing, in general terms, the institution of proceedings to determine the question, should not be construed as contemplating the bringing of suit in another court. *Id.*

3. A receiver of property, having a conveyance under order of court, cannot claim the rents thereafter accruing, as against an assignee thereof who has given notice to the tenants, on the ground that he had no notice of the assignment. *Brownson* v. *Roy*, 617.

See LANDLORD AND TENANT (8).

RECORD—See APPEAL AND ERROR (2, 5); COSTS.

RECOUPMENT—See CONTRACTS (6, 7); SALE (9).

REDEMPTION—See FRAUDULENT CONVEYANCES (3, 4, 6); PARTITION; TENANCY IN COMMON (2).

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RELEASE AND DISCHARGE—See BENEFIT SOCIETIES (2); BUILDING AND LOAN ASSOCIATIONS (2); JUDGMENTS (1); TORTS.

RENEWAL NOTE—See BILLS AND NOTES (7).

REPEAL OF STATUTE—See TAXATION (19–21).

REPLEVIN.

Where, in replevin for property seized on execution against plaintiff's husband, property belonging to the husband, and not covered by the replevin, was included in that turned over to plaintiff, defendant was entitled to a judgment for the return thereof, or its value. *Vicborn* v. *Pollock*, 524.

See EXECUTION (2).

REQUESTS TO CHARGE—See TRIAL (14, 15).

RESCISSION—See BENEFIT SOCIETIES (2); SALE (11–17).

RESERVE FUND—See TAXATION (2).

RES GESTÆ—See CORPORATIONS (2).

RESIDENCE—See TAXATION (4, 5, 8).

REVIEW—See TAXATION (3).

RIGHTS OF WAY—See RAILROADS (1–10).

RULES—See RAILROADS (12–15, 23); STREET RAILWAYS (4).

SALE.

1. Title to the property of one of the parties to a contract of exchange may pass before he has acquired title to that for which it is exchanged. *Pratt* v. *Wickham*, 356.

2. Where defendant agreed to exchange a bull owned by him for a buggy owned by plaintiff and a harness which plaintiff was to procure, and it was agreed that the buggy should be repaired and painted by plaintiff, and, with the harness, left at a certain village, where defendant was to obtain them, and, on the day of the agreement, plaintiff changed the bull to a stag, and was to get it as soon as it should recover, a finding that the title to the bull passed to plaintiff on the day of the agreement was justified. *Id.*

3. In replevin for a bull which plaintiff was to receive on an exchange of property with defendant, the court, having charged that if it was the intention of the parties, at the date of the agreement, that title should pass to plaintiff, then plaintiff was entitled to recover, but that, if such was not their intention, the verdict should be for defendant, further instructed that if the bull was turned over to plaintiff, who then and there changed him from a bull to a stag, that would be "strong evidence" of a change of title, and, if there was a change of title, plaintiff was entitled to recover. *Held*, that the latter instruction implied that the turning over to plaintiff was with intent to pass title, and, so construed, was not erroneous. *Id.*

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SALE—Continued.

4. Under a contract for the sale of dust collectors for ore pulverizers, providing that the apparatus should be shipped in "manufactured state," a failure to rivet the joints of the pipes before shipping was not a breach, where it appeared that the seller followed its usual practice in that respect. *Allington & Curtis Manfg. Co.* v. *Detroit Reduction Co.*, 427.

5. In an action for the purchase price of dust collectors for ore pulverizers, warranted both to convey and separate ore, an instruction that, if the machine failed to do both, there was a breach of the warranty, was not objectionable as requiring a failure both to convey and separate in order to constitute a breach. *Id.*

6. In an action for the purchase price of a machine, an instruction basing the right to recover on whether the machine could, under proper management, have been made to do the work contemplated, sufficiently covered defendant's claim that the machine was "impractical, and mechanically impossible" of successful operation. *Id.*

7. In an action for the price of a machine, in which the buyer claimed a breach of a warranty that the machine would do certain work, an instruction whereby the case was made to turn on whether or not the machine had done the work, regardless of whether it would under proper management, was properly refused. *Id.*

8. In an action for the price of dust collectors for ore pulverizers, in which it appeared that the seller had warranted the collectors to take the ore out of the pulverizers, an instruction that there was a breach of the warranty if plaintiff's agent had certain knowledge at the time the contract was made, and contemplated the delivery of the ore by the pulverizers to the collectors, was properly refused. *Id.* 428.

9. Defendant in an action for the price of a machine, having set up the claim that plaintiff's agent, after repeated attempts to make the machine do the work guaranteed, "gave it up as a bad job," and went away, could not complain that he was not permitted to recoup the cost of subsequent efforts made by himself in the same direction. *Id.*

10. Plaintiff held a mortgage on certain wood, given by E. Defendant bought the wood, to be delivered in the future, giving his note to plaintiff for the purchase price. In an action on a renewal of the note, plaintiff contended that the wood was sold by E., plaintiff releasing its mortgage thereon, and applying the amount of the note on E.'s debt; while defendant claimed that he bought the wood of plaintiff. *Held*, that, if defendant's claim was true, the defense of a partial failure of consideration, due to the fact that all of the wood bought was not delivered, was available, but not otherwise; and that the question was a proper one for the jury. *First Nat. Bank of Hancock* v. *Stringer*, 630.

11. A purchaser of goods is not estopped from refusing to accept them on the ground that they were not shipped within a reasonable time, where, though he was advised of the date of

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SALE—Continued.

shipment a few days in advance, and made no reply, he had previously undertaken, in good faith, to countermand his order because of the delay, and supposed that word would be received by the seller in time to prevent the shipment. *Conkling* v. *Nicholas*, 651.

12. Where a contract for the sale of fruit made payment a condition to the transfer of the property, the buyer's refusal to pay for a third of the fruit as delivered, unaccompanied by any explanation, warranted a finding that he had abandoned the contract, justifying the seller in refusing to make further deliveries. *Town* v. *Jepson*, 673.

13. Where, under a contract for the sale of fruit, a sight draft on the buyer, with bill of lading attached, was to be sent to a certain place in Michigan, and, before the receipt of the draft, the buyer returned to his home in New York, instructing his banker in Michigan to return any drafts to the makers, with directions to forward them to a bank in New York, the seller, after the return of his draft marked "No funds," with the suggestion that it *might be paid* if sent to New York, was not bound to hold the fruit, and send the draft to New York, before he could treat the contract as abandoned. *Id.*

14. The banker to whom the draft in such case was sent was not the agent of the seller, so as to charge the latter with the banker's neglect to notify him of the arrangement made by the buyer for the payment of the draft, but was the agent of the buyer. *Id.*

15. But the banker through whom the draft was drawn *was* the agent of the seller, rendering the latter chargeable with such information as the banker received. *Id.*

16. The fact that a sight draft for the purchase price of fruit, sent to the place agreed upon, was returned unaccepted before the expiration of grace, did not prevent the seller from treating the contract as abandoned, particularly where the buyer had left the State with no intention of returning. *Id.* 674.

17. Where the conduct of a buyer of goods is such as to warrant the inference of an intention to abandon the contract, the seller is not bound to give notice of an election to rescind, in order to be relieved from further performance. *Id.*

See BONA FIDE PURCHASERS; CONTRACTS (10, 11); FRAUD (2); PLEADING (3); TAXATION (12-25).

SCHOOLS AND SCHOOL DISTRICTS.

1. Defendant school district, through its moderator and director, entered into a written contract with plaintiff for a large quantity of school furniture. The goods were delivered, accepted, and used without objection, and payments made thereon. At the annual meeting following the execution of the contract, it was brought before the voters, and no objection made thereto. A warrant was issued and negotiated for the balance due under the contract, payable at a future day, with interest, and the principal sum was subsequently paid

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SCHOOLS AND SCHOOL DISTRICTS—Continued.

by the assessor out of the general fund of the district, and such payment approved by the district. *Held*, that, although there was no formal authorization of the contract, an adoption and ratification were established, so as to entitle plaintiff to recover the unpaid interest on the warrant. *Haney School Furniture Co.* v. *School District No. 1 of Crystal Lake Township*, 241.

2. The provision of the free school text-book law, that books once adopted by the board shall not be changed within five years (2 Comp. Laws, § 4775), was designed for the protection of the public, and not for the benefit of book publishers; and hence a resolution of a board of education, directing the purchase of a certain number of copies of a specified text-book for use in the schools, did not, with the aid of such statute, amount to a binding contract between the board and the publisher of such book for the use thereof for the statutory period. *Attorney General, ex rel. Marr*, v. *Board of Education of Detroit*, 682.

3. Nor could the additional fact that the purchase was preceded by a letter from the publisher to the superintendent of schools, fixing the price of such book with a view to its "complete introduction" into the schools, operate to effect such contract. *Id.*

4. But such resolution constituted a sufficient adoption of the book to preclude the board from changing the same within the five years fixed by the statute. *Id.*

5. In such case the five years began to run from the date of the resolution, and not from the time the book was completely installed in all the schools. *Id.*

6. The provision of the statute (2 Comp. Laws, § 4775) that all text-books used in any school district shall be uniform in any one subject, requires uniformity of the books used in the same grade only, and does not require that all text-books used in different grades on the same subject shall be of the same series. *Id.*

7. A resolution of a board of education to purchase certain text-books for "supplementary use" in the schools shows that there is no intention of adopting the books, within the sense of the statute, and the purchase is illegal and void. *Id.*

See EQUITY JURISDICTION (3).

SECONDARY EVIDENCE—See EVIDENCE (4); EXECUTION (1).

SERVICES, VALUE OF—See CONTRACTS (3).

SET-OFF—See BANKS AND BANKING (2).

SETTLEMENT—See BENEFIT SOCIETIES (2); BUILDING AND LOAN ASSOCIATIONS (2); EQUITY PLEADING; ESTATES OF DECEDENTS (1); FRAUD (2); JUDGMENTS (1); PLEADING (1).

SEWERS—See MUNICIPAL CORPORATIONS (7, 9–19).

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SIDEWALKS—See CONTRIBUTORY NEGLIGENCE (1, 2); MUNICIPAL CORPORATIONS (8); NEGLIGENCE (4).

SLANDER—See LIBEL AND SLANDER.

SPECIAL QUESTIONS—See TRIAL (6).

SPECIFIC PERFORMANCE.

In a suit for the specific performance of a written contract, complainant cannot show that the contract is different from that set out in the bill. *Meshew* v. *Southworth*, 335.

See VENDOR AND PURCHASER (2).

STATUTE OF LIMITATIONS—See ADVERSE POSSESSION; TAXATION (11, 17–23, 25).

STIPULATED DAMAGES—See MUNICIPAL CORPORATIONS (14, 16).

STOCK (CORPORATE)—See BONA FIDE PURCHASERS.

STOCK (LIVE)—See CARRIERS (3, 4, 8–11).

STREET RAILWAYS.

1. An electric railway company is not relieved from the obligation to equip its switches with locks by the fact that such companies generally make no such provision, if common prudence would suggest the adoption of the custom of steam roads in that particular. *Noe* v. *Rapid Railway Co.*, 152.

2. But whether such companies should be held to the duty of maintaining targets or signal lights in the public highways,—*quære*. *Id.*

3. Negligence may be predicated upon the failure of an electric railway company to require its cars to be slowed down on approaching a switch which was unprovided with a lock, target, or light, though the misplacing of the switch was the only danger to be apprehended. *Id.*

4. Where a street-railway company had promulgated a rule that cars should not be started backward until the motorman should receive three bells from the conductor, who should remain on the rear platform while the car was moving backward, the failure of the company to adopt other rules regulating the running of cars backward was not negligence justifying a recovery for injuries to a motorman in collision with a backing car; it not appearing that other or different rules were in use on other roads, regulating such operation of cars. *Seccombe* v. *Detroit Electric Railway*, 170.

5. A corporation operating a suburban electric railway has no right, upon the refusal of an abutting owner to sell a strip of land desired by it, to enter thereon, without any attempt to exercise the power of eminent domain, cut shade trees, grade the property, and construct its track; and equity will enjoin it from so doing. *Freud* v. *Detroit, etc., R. Co.*, 413.

6. The provision of 2 Comp. Laws, § 4097, relating to the improve-

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STREET RAILWAYS—Continued.

ment of the public highways, that no earth shall be dug, plowed, or scraped nearer than eight feet of the margin of the highway without the consent of the abutting owner, does not limit the power of the township board under section 6446, so as to prevent it from authorizing the construction of a street railway within eight feet of the highway line. *Id.*

7. A street-railway company, operating its road through a village under a franchise therefrom prescribing the rate of fare per mile for travel over any portion of its line, is bound by such rate, as to passengers to or from such village, irrespective of the conflicting provisions of franchises granted by other municipalities. *Vining* v. *Detroit, etc., Ry.*, 539.

See MASTER AND SERVANT (1-3, 5); MUNICIPAL CORPORATIONS (3, 4); NEGLIGENCE (1-3).

STREETS—See RAILROADS (4, 5).

SUBROGATION—See FRAUDULENT CONVEYANCES (3, 4, 6).

SUICIDE—See ACCIDENT INSURANCE; TRIAL (14).

SUPPORT, CONTRACT FOR—See DEEDS (12).

SURRENDER—See LANDLORD AND TENANT (6).

SURVEYS—See BOUNDARIES.

TAXATION.

ASSESSMENT: REVIEW.

1. The State board of assessors, provided for by the amendment of 1900 to article 14 of the Constitution, and Act No. 178, Pub. Acts 1901, in determining the average rate of taxation on property throughout the State other than railroad property, with a view to the assessment of the latter, should take as a basis the actual assessed valuation of such other property, as reported to it in accordance with said act, and it has no authority to increase such valuation on the theory that the assessments were too low. *Board of Education of Detroit* v. *State Board of Assessors*, 116.

2. The reserve fund of a life-insurance company is properly included among its liabilities in determining the net assets of the company for the purpose of taxation under 1 Comp. Laws, § 3834. *Michigan Mut. Life-Ins. Co.* v. *Common Council of Detroit*, 408.

3. An assessment on personal property not subject to taxation at the place where assessed may be reviewed by the courts. *Nester* v. *Township of Baraga*, 640.

4. Though the residence of a copartnership for the purpose of taxation is a question of fact for a jury, where the evidence is uncontradicted the court may direct a verdict. *Id.*

5. The business of a copartnership engaged in the manufacture and sale of lumber and the operation of a line of freight boats

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TAXATION—Continued.

was *held* to have been "principally carried on," within the meaning of the tax laws, in the city where its office was located, its books kept, and its various interests directed, rather than in the township in which were situated its mills and lumber yards. *Id.*

See DRAINS (1); RAILROADS (11).

ACTIONS TO COLLECT.

6. A township treasurer may bring suit in the name of his township to recover a tax on personal property, when authorized so to do by the supervisor. *Township of Ovid* v. *Haire*, 353.

7. The testimony of the treasurer that he was so authorized is competent to establish that fact. *Id.*

8. Evidence in an action to collect a personal tax *held* sufficient to authorize the submission to the jury of the question of defendant's residence in the plaintiff township. *Id.*

9. The provision of 1 Comp. Laws, § 3870, that, in a suit for the collection of a tax, the tax roll shall be *prima facie* evidence of the debt sought to be recovered, does not conflict with a taxpayer's constitutional rights. *Township of Decatur* v. *Copley*, 546.

10. Under 1 Comp. Laws, § 3870, providing for the collection of taxes by the township treasurer, by virtue of the warrant issued by the supervisor, by distress and sale, and authorizing him, if otherwise unable to collect a tax on personal property, to bring suit therefor, the authority of the treasurer, during the lifetime of his warrant, is exclusive, and suit cannot, within that period, be brought by the supervisor, under 1 Comp. Laws, §§ 2336, 3863, for the collection of a tax covered by the warrant. *Id.*

See AMENDMENTS (1).

ACTIONS TO RECOVER.

11. The provision of 1 Comp. Laws, § 3876, limiting to 30 days the right to sue to recover taxes paid under protest as therein provided, has no application to an action to recover taxes paid involuntarily, though such payment was accompanied by a written protest. *Pere Marquette R. Co.* v. *City of Ludington*, 397.

SALES: SETTING ASIDE: REFUNDING.

12. Under section 111 of the tax law of 1891 (Act No. 200, Pub. Acts 1891), repealing the law of 1889 (Act No. 195, Pub. Acts 1889), but saving all existing rights, and providing that lands then delinquent should be sold under the earlier act, subject to the proviso that lands bid to the State under such provision should thereafter be subject to the provisions of the act of 1891,—where lands bid to the State under the act of 1889 were afterwards sold as State tax lands at county treasurer's sale held pursuant to the act of 1891, the sale was under the latter act, and, as that act contained no provision for repay-

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TAXATION—Continued.

ment of the purchase price in case the title should be declared void, the purchaser was remediless in such contingency. *Ball* v. *Auditor General*, 521.

13. A landowner is estopped to question the validity of the action of the auditor general in canceling the sale of his land to the State for taxes, and including the same in a subsequent petition, where, having full knowledge of the proceedings, he made no objection thereto until several months after the second sale, when, instead of redeeming therefrom, as he might have done, he resorted to a petition to have it declared void. *Blondin* v. *Griffin*, 647.

14. A tax sale cannot be set aside after confirmation, except for the reasons mentioned in section 70 of the tax law (1 Comp. Laws, § 3893), or where the court was without jurisdiction. Irregularity of the auditor general in canceling a prior sale to the State for the same tax is not ground therefor. *Id.*

15. Section 103 of the tax law of 1869 (1 How. Stat. § 1104), providing for a refunding of the purchase money for a tax title where the same had been "annulled pursuant to law" for any of the causes enumerated in section 164, referred to an annulment in the method prescribed by section 101, and did not apply where the title had been declared void in some other proceeding. *Wolverine Land Co.* v. *Auditor General*, 666.

See TENANCY IN COMMON (3).

CERTIFICATES OF ERROR.

16. Under section 98, subd. 1, of the tax law of 1893 (1 Comp. Laws, § 3921), authorizing the auditor general to issue a certificate of error against a tax deed in case the land was not subject to taxation at the date of the assessment of the taxes for which it was sold, the auditor has no power to issue such certificate solely on the ground that the assessment erroneously included reassessed taxes for a former year. *Flint Land Co.* v. *Auditor General*, 542.

STATUTES OF LIMITATION: HOMESTEADS.

17. Section 115 of the tax law of 1885 (Act No. 153, Pub. Acts 1885) provides that, after a claimant under a tax deed issued by virtue of said act shall have been in actual possession of the premises for five years, he shall be conclusively deemed the owner in fee. Section 116 provides that no action shall be brought against one claiming under a deed so issued after the expiration of five years from the time when the right of action accrued. *Held*, to constitute a statute of limitation, and hence not open to the objection of taking property without due process of law. *St. Mary's Power Co.* v. *Chandler-Dunbar Water-Power Co.*, 470.

18. The provisions of the tax law of 1885 (sections 115, 116), fixing a five-year limitation on actions to recover land from claimants under tax deeds, were fairly within the object expressed in its title, viz., "An act to provide for the assessment of property, and the levy and collection of taxes thereon." *Id.*

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TAXATION—Continued.

19. The provisions in question were not repealed by the amendment of 1889 (Act No. 8, Pub. Acts 1889) to the general statute of limitations (2 How. Stat. § 8698), the same having made no change in the subdivision relating to actions against claimants under tax deeds. *Id.* 471.

20. Nor were such provisions repealed by the tax law of 1889 (Act No. 195, Pub. Acts 1889), which, while in the nature of a general revision, and not expressly re-enacting such provisions, by its terms repealed only such acts and parts of acts as were inconsistent therewith. *Id.*

21. Subsequent legislation examined, and found to contain nothing inconsistent with the provisions in question. *Id.*

22. The provision of section 66 of the tax law of 1889, that no sale should be set aside after the purchaser had been in actual possession for five years, did not operate as a limitation on rights of action. *Id.*

23. The similar provision of section 73 of the tax law of 1893 (Act No. 206, Pub. Acts 1893) is in terms limited to sales under that act. *Id.*

24. The original owner of land deeded to the State under the homestead provisions of the tax law cannot attack the title of a homesteader on the ground that the land was not barren, swamp, worthless, or abandoned, as set forth in the certificate of the examiner, which, prior to the amendment of 1899 (Act No. 107, § 127, Pub. Acts 1899), was a prerequisite to such conveyance. *Semer* v. *Auditor General*, 569.

25. The provision of section 131, Act No. 107, Pub. Acts 1899, limiting the time within which suit might be brought to set aside the title of a homesteader under pre-existing provisions of the tax law to six months after said act became operative, was a valid enactment, and available, though the original sales to the State were jurisdictionally defective, and (CARPENTER, J., dissenting) though the homesteader had not obtained his deed, but had in fact abandoned the land. *Id.*

TENANCY IN COMMON.

1. A tenant in common may, on an accounting with his cotenants, be charged with rent for his occupancy of the premises, if in accordance with the understanding of the parties. *Wettlaufer* v. *Ames*, 202.

2. A tenant in common who redeems from a mortgage foreclosure is entitled to interest on the amount paid, as against his cotenants, at the legal rate, rather than at the rate borne by the mortgage. *Id.*

3. There is no presumption that a purchase at a tax sale by a tenant in common was made for the benefit of his co-tenant, where their interests were acquired at different times, and the taxes were a lien on the lands when the purchasing tenant obtained his original title. *St. Mary's Power Co.* v. *Chandler-Dunbar Water-Power Co.*, 471.

See FRAUDULENT CONVEYANCES (6); PARTITION.

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TEXT-BOOKS, CHANGE OF—See SCHOOLS AND SCHOOL DISTRICTS (2-7).

TICKETS—See CARRIERS (12).

TIMBER—See EQUITY JURISDICTION (2); PUBLIC LANDS.

TITLE TO LANDS—See ADVERSE POSSESSION; DEEDS (5, 6, 10); EJECTMENT (1); VENDOR AND PURCHASER.

TITLE TO PERSONALTY—See SALE (1-3).

TITLE TO STATUTES—See CONSTITUTIONAL LAW (2); TAXATION (18).

TORTS.

The release of one joint trespasser is the release of all, irrespective of the intention of the parties. *Sunlin* v. *Skult*, 208.

See PARTNERSHIP (1).

TOWNSHIPS.

Under Joint Resolution No. 4 of the legislature of 1901 (Pub. Acts 1901, p. 382), providing for a board to audit claims against the disorganized county of Manitou, the territory of which had been divided between C. and L. counties, which claims, when allowed, were chargeable against the territory of the disorganized county, townships of the enlarged counties, although consisting of such territory in part only, were proper petitioners for a writ of *certiorari* to review the action of the circuit court in awarding *mandamus* against such board to compel the allowance of claims. *Fitch* v. *Board of Auditors of Claims Against Manitou County*, 178.

See DRAINS (4, 6); STREET RAILWAYS (6); TAXATION (6, 10).

TRIAL.

1. A witness may be asked, on cross-examination, any question material to the issue, irrespective of the extent of the direct examination. *People* v. *Dupounce*, 1.

2. Where respondent in a prosecution for rape admitted that there was blood on the snow at the place where the offense was alleged to have been committed, undertaking to explain its presence, the admission of other testimony to the same effect, objected to on the ground that witness was not shown to be an expert, was not prejudicial. *People* v. *Rich*, 14.

3. Where, in a prosecution for rape, respondent's mother, as a witness in his behalf, testified that, after the occurrence, she went with P. to see prosecutrix's mother, evidence as to what she said to P. while so accompanying him was proper cross-examination. *Id.*

4. The exclusion of respondent's testimony that S. had no authority to settle the case for him was not prejudicial, where he had testified that he never authorized anybody to settle the matter, and had written S. not to settle. *Id.* 15.

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TRIAL—Continued.

5. An objection to testimony that testatrix was in the habit of using morphine, on the ground that such habit "would have no effect whatever upon the question of mental capacity," did not entitle proponent to urge on appeal that the testimony was improperly admitted because there was no proof that morphine would make one incompetent to make a will, or that testatrix was under its influence at the time the will was executed. *Spencer* v. *Terry's Estate*, 39.

6. Proponent requested the submission to the jury of a special question as to whether, when testatrix handed her lawyer a memorandum of her will, she knew what she was doing. In submitting the question the court said that he supposed it meant, "Was she mentally competent?" *Held*, that, as proponent had no right to submit a question not calling for an answer which would control the main issue, he could not complain of the construction placed upon the question by the court. *Id.* 40.

7. In an action on a fire policy providing that the insurer should not be liable for any loss caused by explosion unless fire should ensue, and then only for the damage by fire, and that the liability of the company should cease if the building should fall, except as the result of fire, the jury found the company liable for its stipulated proportion of the total loss. *Held*, that as this finding necessarily involved a determination that the fall of the building was caused by fire, and not by an explosion, error, if any, in submitting to the jury the question of whether the building fell as the result of an explosion, as well as in admitting testimony as to the proportion of the loss caused by fire, on the assumption that there had been an explosion, was harmless. *N. & M. Friedman Co.* v. *Atlas Assur. Co.*, 212.

8. Where a hypothetical question was objected to below merely on the ground that it did not state facts sufficient to enable the witness to give an intelligent opinion, and that it was not a proper subject for expert testimony, an objection that it omitted certain facts which should have been stated, and assumed some facts not proved, could not be raised on appeal. *Id.* 213.

9. In an action for malicious prosecution, it appeared from the cross-examination of defendant that, while he had owned a certain farm for many years, he did not know just how many acres it contained; whereupon plaintiff's counsel said, "The idea that a man has owned a farm 30 years, and he does not know how many acres there are!" Immediately after, defendant testified that the farm lay upon a lake; that a good deal of it was fractional; that his son owned a part of it; and that, as he had not figured it up, he could not tell within a few acres how many acres there were. *Held*, that the remark of plaintiff's counsel was not prejudicial to defendant under the circumstances. *Gould* v. *Gregory*, 383.

10. On the cross-examination of a witness called by defendant as an expert on the manufacture and shipping of sheet iron, the

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TRIAL—Continued.

witness testified that he had had experience in a certain manufacturing institution; and, on objection to a question as to what had become of that institution, counsel stated in the presence of the jury that, to test witness' expert knowledge, he proposed to show that the company was wrecked by his mismanagement, that two other companies were similarly wrecked, and that every other institution with which he had ever been connected had been ruined. The objection to the question was sustained. *Held*, that such statement was not sufficient cause for reversing a judgment for plaintiff. *Allington & Curtis Manfg. Co.* v. *Detroit Reduction Co.*, 427.

11. The admission of testimony in support of a claim which the court afterwards ruled against in the charge was harmless. *Id.* 428.

12. The submission to the jury of an undisputed item of charge is not prejudicial, where the verdict shows that they allowed it. *Id.*

13. Where, at the close of the testimony in a case, each party claimed that a verdict should be directed in his favor, and the court said to the jury that it seemed to be agreed that it was the court's duty to direct a verdict one way or the other, to which statement no exception was taken, the defeated party could not urge on appeal that there were questions of fact on which he was entitled to go to the jury. *St. Mary's Power Co.* v. *Chandler-Dunbar Water-Power Co.*, 471.

14. In an action on an accident policy, in which it was apparent that insured either committed suicide or was murdered, defendant could not complain of an instruction that the presumption of the law was against suicide, where its own requests to charge were based upon that theory. *Furbush* v. *Maryland Casualty Co.*, 480.

15. It is not error for the trial court to refuse requests to charge consisting of abstract propositions of law, the application of which to the case in hand would not be readily apparent to the jury. *Mosaic Tile Co.* v. *Chiera*, 497.

16. On an appeal from a conviction for burglary, the testimony of a witness who aided in apprehending respondents, that he did not "size them up" as railroad men, was not available error, because of his not having been shown to know how railroad men look or dress, where no such objection was made in the trial court. *People* v. *Wilson*, 517.

17. In an action against a railroad company for injuries to a passenger, defendant's attorney asked plaintiff's attorney to admit that the conductor was killed in the same accident; and plaintiff's attorney replied that "there is no question about that, and it is a fact that the railroad company settled with the widow." *Held*, that as the trial court, on exception by defendant, immediately stated that the remark was improper, ought not to have been made, and must not be considered by the jury, the judgment would not be reversed therefor. *Greenfield* v. *Detroit, etc., R. Co.*, 558.

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TRIAL—Continued.

18. Evidence reviewed, and *held* to show without dispute that the account sued on was the same as that on which judgment had been obtained against defendant's husband; rendering the submission of that question to the jury reversible error. *Beard* v. *Hoffman*, 624.

See APPEAL AND ERROR (1, 4); BOUNDARIES (2, 3); CRIMINAL LAW (10–13); PRACTICE IN CIRCUIT COURT; RAILROADS (9, 17, 20); SALE (3, 5–8); WILLS (3, 5).

TROVER.

The owner of property, by intrusting its possession temporarily to an agent, does not preclude himself from maintaining an action against a third person for its conversion. So *held* where a partnership consigned goods to a member of the firm acting as its traveling salesman, and it was contended that the latter alone could sue. *Baehr* v. *Downey*, 163.

TRUSTS AND TRUSTEES—See BANKS AND BANKING (1).

USURY—See BUILDING AND LOAN ASSOCIATIONS (3).

VAGRANCY—See CRIMINAL LAW (7).

VALUE OF SERVICES—See CONTRACTS (3).

VARIANCE—See EJECTMENT (4).

VENDOR AND PURCHASER.

1. A grantee of land who has given back a purchase-money mortgage, and entered into possession under his deed, is estopped from disputing his grantor's title for the purpose of defeating the payment of the mortgage. *Townsend* v. *Kreigh*, 243.

2. A vendor in a land contract, who was required by its terms to furnish an abstract showing a good and sufficient title, cannot enforce a specific performance thereof, where the abstract furnished was not brought down so as to show title in himself, and there was a mortgage on the premises, which was not discharged until after the commencement of the suit. *Meshew* v. *Southworth*, 335.

See MORTGAGES (2, 3).

VERDICT—See EJECTMENT.

VERDICT, DIRECTING—See TRIAL (13).

VERDICT, SETTING ASIDE—See FIRE INSURANCE (1).

VICE PRINCIPAL—See RAILROADS (20).

WAIVER—See BENEFIT SOCIETIES (2); CARRIERS (11); CRIMINAL LAW (1); FALSE IMPRISONMENT (2); FIRE INSURANCE (4); FRAUD (2); JUSTICES OF THE PEACE (2); LIFE INSURANCE (5–8); MANDAMUS (3); MUNICIPAL CORPORATIONS (16); RAILROADS (14, 15, 23); TRIAL (13).

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WARRANT—See FALSE IMPRISONMENT (1); TAXATION (10).

WARRANTY—See LIFE INSURANCE (1-8); SALE (5-9).

WATERS AND WATERCOURSES—See EMINENT DOMAIN (1, 3, 4).

WAYNE COUNTY TREASURER—See PUBLIC OFFICERS.

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (5); FIRE INSURANCE (1).

WIDOWS—See DOWER; ESTATES OF DECEDENTS (2).

WILLS.

1. On a will contest, evidence of testator's mental condition both before and after the time when the will was executed is admissible to show a want of testamentary capacity, notwithstanding all of the testimony of those present at its execution tends strongly to show that testator was then competent. *Spencer* v. *Terry's Estate*, 89.

2. On a will contest, the attorney who drew the will was asked on cross-examination, "And you did not suggest to testatrix that she was giving all her household belongings and pictures to the library association?" *Held*, that the question was not improper. *Id.*

3. On further cross-examination the witness was asked, "You state to this jury you allowed her to will her personal belongings to the library association, without saying a word to her?" The question being objected to as argumentative, witness offered to state his reasons for having said nothing; whereupon the court remarked that the question *was* "somewhat argumentative," and that witness had better give his reasons. *Held*, that, no objection having been made that the question improperly suggested that testatrix was under witness' control, and the court having recognized the force of the only objection that was urged, and permitted witness to pursue the course he desired, there was no error. *Id.*

4. Testatrix was 70 years of age when the will was executed. Her sole heirs consisted of two sisters and a brother, who lived some distance away, and between whom and herself there had been some bitter feeling. *Held*, that the fact that she bequeathed the bulk of her property to a public library had no tendency to show a lack of testamentary capacity, and that it was error to instruct the jury that it might be considered in determining that question in case they should regard such action as contrary to natural justice. *Id.* 40.

5. Error in so instructing was not cured by a subsequent instruction that testatrix had the right to dispose of her property as she saw fit, and that it was not in itself an indication of mental incapacity for her to leave the bulk of her property to a charitable or public institution, to the exclusion of her relatives. *Id.*

6. Where testator appointed a trust company his "executor,"

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WILLS—Continued.

and gave to his wife "all the use and income" of his entire estate during her life or widowhood, with remainder over to designated beneficiaries, the widow was entitled to the possession and control of all the property, personal as well as real, as soon as the estate should be administered. *Michigan Trust Co.* v. *Hertzig*, 513.

See AMENDMENTS (8); ESTATES OF DECEDENTS (2); PROBATE COURTS (1); TRIAL (5, 6); WITNESSES (1).

WITNESSES.

1. An instruction on a will contest that, if the attorney who drew the will had testified truthfully, the will must stand, was properly modified by adding that the jury should take his testimony, and "all the testimony in the case which they believed to be credible," and then say whether the attorney had testified truthfully and reliably; there being testimony legitimately tending to show that testatrix was mentally incompetent at the time of the execution of the will. *Spencer* v. *Terry's Estate*, 39.

2. It is not competent for the medical director and secretary of a life-insurance company to testify that, in their opinion, the facts misstated in an application for a policy were material to the risk. *New Era Ass'n* v. *Mactavish*, 68.

3. Respondent, having been subpœnaed by the grand jury, informed the prosecuting attorney that he would like to talk with some one in whom he had confidence before testifying, and asked if he could not see the judge who had impaneled such jury. The prosecutor took him to the judge's room, to whom respondent stated that he wanted advice. The judge said that he could not give him any advice, and suggested that he see an attorney; but respondent objected that he was not acquainted with any attorneys who were accessible. The judge thereupon told him that he could not advise him for his personal benefit, but would say that, while he was not obliged to testify to anything before the grand jury to incriminate himself, if he did testify, he should tell the truth, whatever it was; whereupon respondent, after a little delay, made a confession to the judge. *Held*, that such confession was a confidential communication, within the principle applicable to the relation of attorney and client, and was inadmissible against respondent. *People* v. *Pratt*, 125.

4. Such communication, having been made to the judge in control of the grand jury, before whom respondent had been called as a witness, and might by such judge be compelled to testify, was likewise privileged, within the rule governing testimony before such jury. *Id.*

5. In replevin, it was not error to permit defendant, on cross-examination, to be asked whether he had not pleaded guilty to stealing a grindstone from another, for the purpose of affecting his credibility. *Pratt* v. *Wickham*, 356.

6. In replevin for live stock claimed by plaintiff as surviving partner of defendant's decedent, plaintiff's testimony that,

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WITNESSES—Continued.

when stock was sold, the proceeds were divided between him and decedent, and that a certain animal was a part of the common stock, was inadmissible as relating to facts equally within the knowledge of deceased. *Sparling* v. *Smeltzer*, 454.

7. A borrowing member of a building and loan association cannot testify, in a suit to cancel the mortgage, to matters which were equally within the knowledge of a deceased agent of the association. *Hoskins* v. *Rochester Sav. & Loan Ass'n*, 505.

See CRIMINAL LAW (1, 5).

WRITTEN INSTRUMENTS—See BILLS AND NOTES (5); CONTRACTS (5, 10, 11); FRAUD (1).

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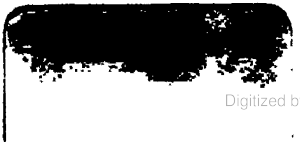
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